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THE SPECTACULAR development of labor arbitration as a method of disputes settlement has been paralleled by the equally spectacular increase of women's participation in the labor force. During the past fifty years, both situations have undergone extensive and complex changes. Labor arbitration has become the pre-eminent mode of industrial disputes determination in the United States. Today, over 95 percent of the collective bargaining contracts in force provide for the arbitral resolution of contract interpretation disputes.[1] The number of women in the labor force, on the other hand, has quadrupled to over 31 million since the adoption of women's suffrage in 1919 and the rate of participation has nearly doubled from less than 23 percent to more than 43 percent.[2]

While the increasing involvement of women in the compensated labor force[3] has caused many to reevaluate old irrational prejudices and

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1. Collyer Insulated Wire, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931, 1937 n.17 (Aug. 20, 1971).

2. NEW YORK DEP'T OF LABOR, WEEKLY LABOR NEWS MEMORANDUM, Aug. 26, 1970, at 2. *See also* TIME, July 26, 1971, at 56. For additional references and citations on the present status of women in the labor force see Landau & Dunahoo, *Sex Discrimination in Employment: A Survey of State and Federal Remedies*, 20 DRAKE L. REV. 417, 419-21 (1971) [hereinafter cited as Landau & Dunahoo].

3. As distinguished from the *housewife* labor force which is usually poorly compensated or all too frequently uncompensated.

stereotypes, sex discrimination in employment still persists widely. Whether it arises from inferiority complexes, male chauvinism, romantic paternalism,[4] or simple fear of job loss and competition, discrimination frequently denies women equal employment rights with men without any rational basis. This situation, coupled with the increased number of women employees covered by collective bargaining contracts which provide for arbitration of grievances, has given rise to a growing body of arbitration awards concerning sex discrimination in employment.

Complementing the growth of arbitration and women's participation in the labor force has been the increase in legislative protections against sex discrimination—Title VII of the 1964 Civil Rights Act[5] being the most notable of recent enactments. In general, Title VII contains broad prohibitions against violations of employment rights through discrimination. But one provision, in effect, condones otherwise illegal sex discrimination in those instances where sex is "a bona fide occupational qualification [bfoq] reasonably necessary to the normal operation of that particular business or enterprise."[6]

The purpose of this article is to analyze the application of the bfoq exemption in the arbitral forum as compared to judicial decisions and administrative guidelines. Problems of application arise whenever sex is used as a criterion to justify distinctions in the treatment of prospective or current employees. The discussion to follow will aim at determining how well industrial jurisprudence has anticipated and kept pace with the courts in insuring equal employment rights for both sexes.

I. The Arbitral Setting

The scope of an arbitrator's jurisdiction is controlled, as a general rule, by the arbitration clause in the union-management labor contract. Arbitration clauses usually provide that an arbitrator is limited to interpreting and applying the contract, with no power to modify it.[7] As

4. Landau & Dunahoo, *supra* note 2, at 420-22.

5. 42 U.S.C. §§ 2000e to e-15 (1964), *as amended*, (Supp. V, 1971).

6. *Id.* § 2000e-2(e) (1964). Title VII provides the most far reaching federal statutory ban on sex discrimination in employment. With certain exemptions, Title VII outlaws sex discrimination: (a) by private employers (operating in commerce with 25 or more employees) in hiring, classifying, or firing, and in setting compensation, terms or conditions of employment; (b) by labor organizations (with 25 or more members) in excluding, classifying, failing to represent, or expelling members; and (c) by employment agencies (serving employers with 25 or more employees) in failing to refer individuals for employment on an equal opportunity basis.

7. *See* C. UPDEGRAFF, ARBITRATION AND LABOR RELATIONS 111-13 (3d ed. 1970).

the Supreme Court of the United States has noted: "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice."[8] Thus, while an arbitrator cannot interfere with clearly established management prerogatives (for example, setting job qualifications), he nevertheless can definitely determine whether or not an antidiscrimination clause in a contract is being violated.[9] In doing so, he can look for guidance from many sources (*e.g.*, constitutional and statutory standards) so long as his award draws its essence from the contract.[10]

Arbitrators differ widely over what standard(s) they should apply in making their determination as to whether the antidiscrimination clause in a conflict has been violated. If a dispute is under a contract expressly incorporating Title VII of the 1964 Civil Rights Act, they are, of course, expected to apply judicial and administrative interpretations of Title VII in deciding whether there has been a violation. If, on the other hand, a contract includes only a general no-sex bias clause or no such clause at all, there is widespread disagreement among arbitrators over their responsibility to apply Title VII as well as its judicial and administrative gloss. Rarely does a contract forbid application of federal or state law.[11]

One arbitrator, faced with conflicting federal and state law when deciding whether the antisex bias clause in a contract was being violated, pointed out the divergency of opinion on his proper role:

> There are arbitrators who confine themselves strictly to the contract language and leave employees and unions to the courts or administrative tribunals for interpretation or enforcement of statutes and governmental regulations.
>
> There are other arbitrators, including the arbitrator in this case, who are of the opinion that contracts include all law applicable thereto, hence the arbitrator should apply the law (constitutional, statute, and common) to each collective bargaining agreement.
>
> Other arbitrators take a middle ground expressing the view that no arbitrator should render an opinion which, if followed, would require an employer (or union) to breach a statute, and

8. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

9. Phillips Petroleum Co., 68-2 CCH Lab. Arb. Awards 4791 (1968) (Allen, Arbitrator).

10. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

11. *But see* Mead Corp., 65-2 CCH Lab. Arb. Awards 5329, 5331 (1965) (Talent, Arbitrator).

that arbitrators may apply the law if it is clear and not ambiguous.[12]

Likewise, another arbitrator held that federal law has supervening effect over both state law and labor contracts.[13] In his opinion, it was "manifest" that Title VII is the governing standard in sex-bias grievances.[14] Consequently, he felt that a failure to apply Title VII to an arbitral dispute "would not only be a disservice to the parties but an abdication of [his] very function and responsibility as contract designated arbitrator," since "[t]he collective bargaining relationship implies a system of industrial jurisprudence operating within a framework of rules of law."[15] This seems to be the prevailing view because "many arbitrators do not feel that giving recognition to the law in interpreting contracts is adding to the contract. And ignoring it would only open Pandora's box."[16] Furthermore, "[a]n arbitrator's award contrary to public policy and law . . . may not be enforced by courts"[17] since "all applicable law must be considered implicitly and inferentially a part of a compact between entities existing and doing business under the dominion and sovereignty of a State."[18]

12. Simoniz Co., 70-1 CCH Lab. Arb. Awards 3092, 3096-97 (1969) (Howlett, Arbitrator).

13. Avco Corp., 70-1 CCH Lab. Arb. Awards 4314 (1970) (Turkus, Arbitrator).

14. *Id.* at 4316.

15. *Id. See also* Pennsylvania Elec. Co., 66-3 CCH. Lab. Arb. Awards 5912, 5913 (1966) (Stein, Arbitrator), where another arbitrator observed: "So far as statutory meanings can be ascertained with confidence as to their accuracy, they should be resorted to in defining those terms of the collective bargaining agreement whose ultimate meaning and application are controlled by the statute. It seems to me improper and incorrect to define terms in an agreement in a manner plainly inconsistent with the overriding legal definition, saying to the parties that what is invalid as a matter of law is proper and correct under the collective agreement, thus necessitating recourse to administrative agencies and the courts to vindicate a manifest legal right."

16. CCH LAB. LAW REP., UNION CONT. ARB. ¶ 58,596, at 84,294 (1970).

17. W. WILSON, LABOR LAW HANDBOOK 351 (1963).

18. Alsco, Inc., 67-2 CCH Lab. Arb. Awards 4304, 4308 (1967) (Altrock, Arbitrator). *See also* United Packers, Inc., 62-2 CCH Lab. Arb. Awards 5026, 5027 (1962) (Kelliher, Arbitrator), where another arbitrator stated the following: "This Arbitrator is cognizant of the court decisions cited by the Union and the Company as being controlling in this case. These decisions are not unanimous. Arbitrators are not bound by judicial precedent. What may be the federal substantive law is not controlling in an arbitration proceeding wherein the Arbitrator is required to construe the language of the Contract by application of recognized maxims of contract interpretation and the general understanding of the Parties in the negotiation and administration of Collective Bargaining Agreements." A similarly-inclined arbitrator held that, while a court ruling on the subject matter of the grievance is not binding on the arbitrator, a court ruling may nevertheless be advanced as evidence in support of a party's contention. Philadelphia Transp. Co., 67-2 CCH Lab. Arb. Awards 5328, 5330 (1967) (Gershenfeld, Arbitrator).

Nevertheless, some arbitrators feel that they have "no authority to go beyond the four corners of the contract when resolving a dispute."[19] Accordingly, they have sometimes enforced contract provisions in obvious conflict with federal law and have left grievants to pursue their legal redress in the courts.[20]

Agency determinations have also been ignored on occasion. Noting that administrative tribunals function "under different rules, and for different purposes," one arbitrator said that this no-binding principle is of particular importance when an agency is permitted "to consider factors outside the applicable labor agreement in reaching its decision."[21]

With this quick overview of the arbitral setting completed, our attention will now be focused on how the Title VII bfoq has been applied. We will examine when and how sex-based standards may be applied to determine qualifications for employment and what restrictions may be placed on working conditions.

II. Employment Qualifications

The initial obstacles women have had to overcome in their efforts to find work are the various restrictions placed on their free entry into the labor market. Traditionally, private biases have been supplemented by discriminatory qualification standards and supported, until recently, by well-intentioned state legislation. Title VII and its bfoq exemption were superimposed on that structure with the hope that their application through arbitral and judicial proceedings would break down such discriminatory employment patterns. Slowly, they seem to be achieving some measure of success.

A. Protective Legislation

The root of women's employment problem has been in the classical stereotype of women as the "weaker sex" whose functions are confined to the home. In the early 1900's, when sweatshop employment with twelve-hour and longer workdays of backbreaking labor was a common condition, states passed "protective legislation" to insulate women and children from total exploitation and from some of the hazards of industrial employment. Limitations were placed on the num-

19. CCH LAB. LAW REP., UNION CONT. ARB. ¶ 58,596, at 84,293 (1970).

20. Eaton Mfg. Co., 66-3 CCH Lab. Arb. Awards 6795, 6800 (1966) (Kates, Arbitrator).

21. Mercer, Fraser Co., 70-2 CCH Lab. Arb. Awards 5033, 5035 (1970) (Eaton, Arbitrator).

ber of hours they could be worked in a day or week, on the amount of weights they could be required to lift or carry, and on many similar burdens of employment. Unfortunately, while the protective motive had necessary and noble objectives at the time, the resulting statutory enactments were used instead by employers as a justification to disqualify women from available employment opportunities. By manipulating the hour or weight lifting requirements incident to a job, employers could easily render all women ineligible.

1. Pre-Title VII Arbitration Decisions

Prior to the passage of Title VII, women had very little success in challenging employment discrimination if the defense of protective legislation was available. Sex-based discrimination which smacked of stereotyping was usually upheld in arbitral awards. Typically, one arbitrator found that past practices of an employer excluded women from the production area of his company because of health, safety, and moralistic reasons. In upholding the company's refusal to allow a senior woman to bump a junior man, he added that state protective laws, sponsored by companies and unions alike, "illustrate the common goal of protecting the health and promoting decent working conditions for females in industry."[22]

A common issue to most of the employment practice and protective law challenges has been whether sex may be the sole criterion in an employment selection process—whether sex alone may disqualify an individual from the opportunity of applying and being considered for a job. Decision makers have been asked to decide whether applications may be evaluated on the basis of class stereotypes or whether applicants must be considered on their individual qualifications. Protective legislation is premised on the traditional stereotype procedure.

The majority of pre-Title VII arbitral awards seem to have followed the stereotyped conceptions of women's ability and to have allowed the protective law defense. For example, in one case, an arbitrator upheld the layoff of senior women before junior men in jobs involving heavy, dirty, and physically demanding work that "cannot, and should not, be performed by women."[23] Women had at various times performed substantially all of the heavier work, but only sporadically and for brief stretches. The woman grievant testified that she had

22. Blaw-Knox Co., 31 Lab. Arb. 488, 491 (1958) (Duff, Arbitrator).

23. Electrical Eng'r & Mfg. Corp., 35 Lab. Arb. 657, 661 (1960) (Roberts, Arbitrator).

reservations about being able to perform all of the tasks, yet she was not given a chance to try to do so. This approach was carried even further by an arbitrator who upheld the denial of a job to women on the basis of such factors as safety, convenience, efficiency, and ability to perform effectively.[24] The fact that a few females had previously performed identical or similar duties was ruled immaterial; female applicants were not entitled even to a thirty-day trial period.

Another arbitrator gave such deference to the past practice of assigning women to the particular job of detonator loading as to consider it a working condition of long standing in that industry.[25] The job required high manual dexterity, an ability generally attributed to women. The evidence showed that very few males could perform the work as efficiently and safely. Therefore, the male grievants were considered to be rightfully rejected even though they were not given an opportunity to qualify as individuals. Moreover, an expert testified that the company "would have to screen approximately 100 men in order to find two who could perform this type of work with the same efficiency and as safely as female employees, and that testing a large number of male employees at this type of work would greatly increase the possibility of explosions."[26]

Surprisingly, some arbitrators exacted "individualized" treatment for both male and female employees long before the enactment of Title VII. In the absence of nondiscrimination clauses in contracts, these arbitrators relied upon other provisions in contracts—such as the common provision that seniority and ability to do the work shall govern in job rights. For example, one arbitrator in 1945 held that the company could not layoff senior women "merely because they are women . . . ."[27] Rather, the layoffs "must be considered strictly on an individual basis and not on a group basis."[28] Another arbitrator determined in 1958 that the test of ability to do the job "is not whether . . . the job is . . . difficult for women to perform, but rather whether the women have the actual or potential ability or capacity to perform

24. Marathon Elec. Mfg. Co., 31 Lab. Arb. 656, 658 (1958) (O'Rourke, Arbitrator).

25. Day & Zimmerman, Inc., 27 Lab. Arb. 348 (1956) (Horton, Arbitrator).

26. *Id.* at 353.

27. Republic Steel Corp., 1 Lab. Arb. 244, 248 (1945) (Platt, Arbitrator). The company apparently had lowered its standards during the war, but then practiced wholesale laying off of women after the war (without attention being given to whether any of the women could meet the reinstated higher standards).

28. *Id.*

the job reasonably satisfactorily."[29]

Several other arbitrators dealt affirmatively with employer stereotyping in a variety of other ways. One, recognizing that many men can cook, rejected a contention that "the male animal suffers from natural handicaps to perform kitchen duties."[30] Accordingly, he ruled that an employer violated the seniority recall provision in bypassing a laid-off male employee for the position of cafeteria helper. Another, ruling that a contract required bidders to be judged on their individual qualifications, pointed out that the employer's "concern" over the health and safety of its female employees was really a subterfuge for discrimination.[31] He rejected the claim that heavy lifting was required—noting that the material was moved by mechanical equipment and not by hand. Also, he felt that the necessity for climbing and crawling around the stock while taking inventory was "not insurmountable for a female wearing slacks."[32]

Only a few cases were found which raised the specific issue of whether an employer had tried to qualify women or had instead arbitrarily acquiesced under the state legislation, and which held that acquiescence resulted in illegal sex discrimination. In one of these cases, the arbitrator determined that the employer could have assigned women employees on other jobs in the department not requiring lifting in excess of the legal limit for women.[33] But in refusing to hire women in any of the jobs, including those not requiring heavy lifting, the employer violated the contractual provision concerning seniority. In another case, the arbitrator held that there would not have been an unreasonable burden on the employer to have assigned women employees to jobs not requiring overtime work (in violation of the daily hours

29. Young Spring & Wire Corp., 30 Lab. Arb. 914, 919 (1958) (Prasow, Arbitrator). Another arbitrator in 1958, holding that the employer's layoff of senior women before junior men, determined that "there is no evidence bearing upon the individual qualifications of the grievants." Westinghouse Elec. Corp., 30 Lab. Arb. 988, 992 (1958) (Doyle, Arbitrator). Placing the burden of proof upon the company to show "lack of ability of the senior employee," the arbitrator noted that the company "has chosen, rather, to base its case on the general effect of weight lifting on females generally."

30. Allied Chem. Corp., 35 Lab. Arb. 268 (1960) (Valtin, Arbitrator).

31. Phillips Chem. Co., 41 Lab. Arb. 411, 412 (1963) (Schedler, Arbitrator).

32. *Id.* *See also* National Fireworks Ordinance Corp., 23 Lab. Arb. 289, 295-96 (1954) (Smith, Arbitrator), where an arbitrator, rejecting a claim that the unsuitability of the work for women justified the company's refusal to transfer senior women into these positions, noted that nothing in the contract placed any limitation upon assignment of women to these jobs. Moreover, the female grievant had performed the job previously.

33. Chrysler Corp., 7 Lab. Arb. 386, 391 (1947) (Wolff, Arbitrator).

limit for women under the California Labor Code).[34] Consequently, the employer violated the contract's bar on sex discrimination. A third arbitrator held that the company could readily comply with the working conditions for females as set forth under a state industrial commission order (providing facilities for heating food for graveyard shift employees);[35] the conditions could not be relied upon by the employer as an excuse for discrimination against women since they did not "prohibit" employment of females but rather only prescribed certain minimal conditions to protect them. Only these few arbitrators were able (and willing) to look behind the particular facts to distinguish the nonapplication of the statutes to the situations at hand, yet these decisions proved to be a forecast of things to come.

2. Post-Title VII Arbitration Decisions

The post-Title VII legal battles to eliminate sex discrimination from protective legislation have most often focused on the allegation that women are unable to do significant weight lifting or other related work requiring "masculine physical prowess." In addition to the numerous state laws placing arbitrary ceilings on the weight women employees may lift, there are many restrictions which have been established by employers acting on their own initiative. Title VII, on the other hand, provides that there should be no preferential treatment to any individual or group because of sex.[36] While some of its other provisions expressly countenance preferential treatment for Indians[37] and veterans,[38] there is no such provision regarding sexual preferences. Instead, preferential treatment on the basis of sex would amount to reverse discrimination, obviously illegal under language that an employer may not "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

34. Whittaker Controls & Guidance, 42 Lab. Arb. 938, 941 (1964) (Roberts,

35. U.S. Borax & Chem. Corp., 40 Lab. Arb. 916, 919 (1963) (Robert, Sanchez, Long, Swain & Starkey, Arbitrators). In other cases, one arbitrator noted that the state law had not been invoked against any employer for employing women in the enumerated position, Ohio Steel Foundry Co., 5 Lab. Arb. 12 (1946) (Hampton, Arbitrator); another concluded that the evidence presented did not clearly establish that the employment of women on the particular job would violate state law, Koehler Aircraft Prods. Co., 32 Lab. Arb. 284 (1959) (Teple, Arbitrator); while a third noted that the statute did not bar women from such jobs prior to the employer's unilateral change in the plant's vacation relief system, Tee-Pak, Inc., 31 Lab. Arb. 160 (1958) (Fitzgerald, Cleary & Joyce, Arbitrators).

36. 42 U.S.C. § 2000e-2(j) (1964).

37. *Id.* § 2000e-2(i).

38. *Id.* § 2000e-11.

terms, conditions, or privilege of employment, because of such individual's . . . sex . . . ."[39] In other words, under Title VII, a person must neither be discriminated against nor be given preference merely because of his or her sex, but rather must be treated as an individual. This policy would seem to be in direct conflict with sex-discriminatory protective legislation.

a. Decisions Striking Down Sex Discrimination

Certainly the trend in arbitral decisions has been to ignore traditional stereotypes and discriminatory protective legislation in favor of assuming an individualized approach to contract interpretation.[40] For example, an arbitrator held in 1966 that a company violated the no-sex bias provision in a contract when it refused to open up some "male" jobs for bidding by women on layoff.[41] The arbitrator, rejecting the company's assertion that the jobs were beyond the physical capacities of females, declared that women cannot be excluded as a class. Rather, he felt that the no-sex bias provision in the contract, read in light of Title VII, meant that women must be given an opportunity individually to prove their own qualifications. Ruling that an employer cannot arbitrarily hold women disqualified because of their sex, he nevertheless recognized that an employer "has the right to condition the assignment of females to hitherto all-male jobs upon their passing of a medical or other examination."[42] Such an examination must be geared to determining "the individual employee's qualifications, skill, and ability, including his or her physical ability to do the work."[43]

In a 1967 case, a union, representing three females who claimed they suffered physical pains from operating a "T-handle" machine, sought to bar women as a class from being able to work at that job on the basis that the job was too physically rigorous and emotionally trying for women to perform.[44] In effect, the union was resisting the employer's attempt to comply with Title VII. Considering his role to

39. *Id.* § 2000e-2(a).

40. Title VII does not expressly supersede state legislation "other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." *Id.* § 2000e-7. Thus, in order for state protective legislation to remain valid under a Title VII challenge that it permits or requires an unlawful employment practice, the subject matter of the state statute must be demonstrated to be a bfoq for that particular job.

41. International Paper Co., 47 Lab. Arb. 896 (1966) (Williams, Arbitrator).

42. *Id.* at 898.

43. *Id.*

44. Allen Mfg. Co., 49 Lab. Arb. 199 (1967) (Hogan, Arbitrator).

be limited to that of interpreting the contract (and not the law), the arbitrator still found the proposal to be discriminatory under a no-sex bias provision in the contract since its effect would be to deny the "T-handle" machine job to a senior female bidder who wanted and was entitled to it.

The decision relied primarily on the testimony of a doctor who serviced several plants in the company's area. He testified that he had personally observed the job and saw no reason why women could not perform it. Consequently, the arbitrator held that the job was not shown to require "a man's physical strength or stamina or [contain] distinctly male job characteristics."[45] In order for the union to be successful in its move to make the "T-handle" work an "all-male" job, the arbitrator intimated that the union must prove that "the physical requirements of the job itself were such as to warrant barring all female employees, now and in the future, from the job."[46]

Relying heavily on Title VII and the EEOC guidelines, another arbitrator held that a company improperly refused to assign female employees to jobs requiring overtime work solely because the duties involved pulling heavy carts for some distance.[47] "Recognizing that the Arbitrator's function is not to determine whether there is a violation of Title VII,"[48] he nevertheless emphasized the EEOC guidelines' requirement of individualized treatment[49] in deciding how to interpret the no-sex bias provision in the contract. The company had contended that "the [j]ob in its entirety was beyond the physical capabilities of our female employees." Yet, the arbitrator observed that "[n]o testimony was given as to the height, weight, general health, strength, past work history, or in fact, any other matter" regarding the grievants.[50] Finding no magical formula for determining whether women can perform certain "heavy" tasks, he suggested that the company may have to test each individual or institute a trial and error system. He also pointed out that " 'lifting' weight is not the same as 'pulling' weight,"[51] and thereby escaped any conflict between his award and protective law prohibitions.

45. *Id.* at 202.
46. *Id.* at 201.
47. Richardson Co., 68-2 CCH Lab. Arb. Awards 5199 (1968) (Wright, Arbitrator).
48. *Id.* at 5201.
49. *See* 29 C.F.R. § 1604.1(a)(1)(ii) (1971).
50. 68-2 CCH Lab. Arb. Awards at 5200-01.
51. *Id.*

b. Decisions Supporting State Protective Laws

But there have been other arbitration decisions involving lifting in the post-Title VII period where women have been disqualified as a group yet no discrimination was found. The protective law stereotype was apparently an important consideration in each case. For example, despite a union's request that females be given an opportunity to qualify for a job, one arbitrator stated flatly that women are "not physically able to perform such heavy work."[52]

Other arbitrators have reached similar results. One held that a woman employee had been properly barred from a job classification requiring heavy lifting, even though less lifting would be required at the particular work station in question.[53] He pointed out that the job description required this employee to be ready and able to work at any station. Moreover, this essentially "male" position had been established several years earlier because the female operators at that time could not lift the pans containing parts to maintain uninterrupted operations.

In another case, a layoff plan was upheld in which junior males continued working in so-called heavy tasks while senior females were laid-off.[54] Since Title VII had been incorporated into the new contract, the arbitrator felt that it was proper for him to turn to Title VII and the EEOC guidelines for guidance in determining the meaning of a contract clause banning sex discrimination, although Title VII was not, in his opinion, to be applied "with strict literalness, but rather in the light of reason and practicality."[55] Under the layoff procedure in question, women employees were laid-off completely rather than being assigned (as their seniority and qualifications permitted) to a general labor pool (an "all-male" classification) at the steel mill. The arbitrator observed, without explaining his basis in fact, that only exceptionally strong women could perform the heavy tasks in the general labor pool. He noted that so few women could qualify that, under the EEOC guidelines, it would be unreasonable for the company

52. Great Atlantic & Pacific Tea Co., 69-1 CCH Lab. Arb. Awards 3961, 3962 (1968) (Goodman, Arbitrator). Basing his decision strictly on contract interpretation, the arbitrator concluded that the parties to the contract did not contemplate the transfer of female employees to the meat boning deparment because of the physical requirements.

53. Robertshaw Controls Co., 67-1 CCH Lab. Arb. Awards 3220 (1967) (Shister, Arbitrator).

54. Weirton Steel Co., 68-2 CCH Lab. Arb. Awards 4683 (1968) (Kates, Arbitrator).

55. *Id.* at 4687.

to be forced into accepting a handful of women and having to establish and maintain separate restroom facilities for them as required by state law. While his conclusion about separate facilities could be true, nevertheless his premise that so few could qualify is valid only when (as here) Title VII's requirement that women be given an opportunity is ignored.

c. The Weeks and Bowe Cases

Soon after these decisions, two federal courts made key pronouncements which have served as the basis for subsequent interpretations of Title VII's bfoq exemption. The first came on March 4, 1969 when the Court of Appeals for the Fifth Circuit, in *Weeks v. Southern Bell Telephone and Telegraph Co.*,[56] launched an attack on state weight lifting protective legislation. Determining that the legislative history of Title VII indicates that the bfoq exemption for sex was intended to be "narrowly construed,"[57] the court ruled that:

> [I]n order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.[58]

The court concluded that the employer had not met that burden here, since it "introduced no evidence concerning the lifting abilities of women."[59] Rejecting the company's stereotyped characterization that women generally cannot do heavy lifting, the court mused: "Labeling a job 'strenuous' simply does not meet the burden of proving that the job is within the bona fide occupational qualification exception."[60]

The Court of Appeals for the Seventh Circuit made a similar holding in *Bowe v. Colgate Palmolive Co.*[61] Although there was no state protective law involved, the company had imposed its own thirty-five pound weight-lifting limit on jobs open to women based upon its general analysis of weight-lifting abilities of women. The court noted with approval the EEOC's decision stating that Title VII prohibits " 'stereotyped characterization of the sexes' [which precludes] consideration of individual capacities as to physical strength and particular job requirements," and, consequently, that consideration must be given to women

56. 408 F.2d 228, 232-33 (5th Cir. 1969).
57. *Id.* at 232.
58. *Id.* at 235.
59. *Id.*
60. *Id.* at 234.
61. 416 F.2d 711, 718 (7th Cir. 1969).

applicants "on a highly individualized basis."[62] Recognizing that the type, frequency, and duration of lifting can increase the degree of exertion and consequently diminish the number of women capable of performing heavy lifting, the court held that the company could retain a thirty-five pound weight-lifting requirement "as a general guideline for *all* of its employees, male and female."[63] The company was required to notify all employees of openings on jobs requiring heavy lifting. Any employee who could "demonstrate his or her ability to perform more strenuous jobs on a regular basis" had to be allowed to "bid on and fill any position to which his or her seniority may entitle him or her."[64]

A federal district court,[65] relying on *Bowe*, went even further. It determined that sex was not a bfoq for a job requiring the lifting of sixty pounds, even though "on the average, men can perform these tasks somewhat more efficiently and perhaps somewhat more safely than women."[66]

Additional qualifications have been made in other areas of state protective legislation. One court, while invalidating an hours limitation because of women being denied the economic opportunity of overtime work, recognized also that maximum hours laws discriminate against *men*, since employers are forced by state law to impose the burdens of overtime work primarily on their male employees.[67] Another court, denying a motion to dismiss the complaint, rejected an employer's twin assertions, ruling instead that males have standing to claim sex discrimination under Title VII and that a few female plaintiffs have standing to challenge a law designed as protection for women as a class.[68]

The EEOC, reversing its earlier stance,[69] has now assumed in its

62. *Id.* at 717-18, *citing* EEOC Decision No. AU68-10-209E (1968).

63. *Id.* at 718 (emphasis added).

64. *Id.*

65. Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969).

66. *Id.* at 759.

67. Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304, 1306 (S.D. Ill. 1970). *See also* Bowe v. Colgate Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971), where the court characterized all sex discrimination as invidious discrimination under the equal protection clause of the Fourteenth Amendment.

68. Utility Workers Local 246 v. Southern Cal. Edison Co., [1969-1970 Transfer Binder] CCH EMP. PRAC. GUIDE ¶ 9369 (C.D. Cal. 1969).

69. The EEOC's original guidelines, issued in 1965, merely questioned whether state protective legislation was still relevant in our modern technology. 30 Fed. Reg. 14927 (1965).

amended guidelines the more extreme position that state protective legislation does not take into account "the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect."[70] Accordingly, the EEOC will not consider state protective legislation "a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational exception."[71] The EEOC's position, for example, is that a women's maximum hours law "presumably is predicated on the belief that women as a class are genetically incapable of safely working the same number of hours as males."[72] In one case it held that "sex is not a bona fide qualification for occupations involving ten or more work hours in a single day where . . . sex is not likewise a bona fide qualification during regular hours for those occupations,"[73] and, in another case, that "sex is not a bona fide qualification for jobs requiring the lifting of weights."[74] Before reaching such a decision on a particular law, however, the EEOC confers with appropriate state authorities to determine whether the *present* effect of state protective legislation is protective or discriminatory.[75] All such laws examined by the EEOC to date have been found to have a discriminatory effect.

d. Decisions After Weeks and Bowe

Yet even after *Bowe* and *Weeks*, some arbitrators have avoided the individualized approach. One case held that frequent heavy lifting can be a legal bar to a woman attempting to bid into "male" jobs.[76] The arbitrator found that the grievant was not able to perform all of the physically heavy duties in the job classification. He noted, for example, that whenever "X" department (all female) and "Y" department (all male) employees have worked side-by-side and heavy physical work was required, "the woman stood aside while the man performed it."[77] Recognizing that "Y" department employees rarely would have to perform all of these heavy operations in one day or even in a month, he nevertheless was satisfied with the company's contention that a woman in "Y" department "would have to be assignable to any of these duties or else this needed flexibility and efficiency would be

70. 29 C.F.R. § 1604.1(b)(2) (1971).
71. *Id.*
72. EEOC Case No. VAL 9-023, CCH EMP. PRAC. GUIDE ¶ 6032, at 4058 (1969).
73. *Id.*
74. EEOC Decision No. 70-03, CCH EMP. PRAC. GUIDE ¶ 6053, at 4088 (1969).
75. EEOC Case No. YSF 9-056, CCH EMP. PRAC. GUIDE ¶ 6014 (1969).
76. Eastex, Inc., 70-2 CCH Lab. Arb. Awards 5109 (1970) (White, Arbitrator).
77. *Id.* at 5110.

impaired." He took the position that "if an employee cannot perform all the duties of a classification, a company has no obligation to let such employee bump into it."[78]

On the other hand, disqualifications have generally been on the basis of an individual lacking the requisite qualifications. In upholding the denial of a senior woman's bid, one arbitrator stressed the physical comparisons between the individual female and male applicants.[79] The senior female was only five feet tall and weighed 115 pounds, while the junior male was five feet nine and weighed 175 pounds. Both had been probationary employees, but the male was awarded a permanent job while the female was transferred to a lower-paying job. The record showed that, while working as a probationary employee, the female could not perform several duties or had difficulty in doing them beyond the bare minimal level of operation. For example, she was unable to push the hand truck into place without assistance and was unable to see gauges for maneuvering the handles through the machine. On the other hand, the male was capable of satisfactorily performing all of the job duties, including those the female could not. Noting that the contract provided for the most senior of relatively equally qualified bidders to receive the job, the arbitrator held that the company must "reasonably" exercise its rights under the contract "to consider and determine the qualifications and abilities of the employees involved."[80] He continued: "If the grievant had been the only bidder for the job or had qualifications and abilities relatively equal or superior to another bidder, the Company would have been obligated to accept such a bid on a trial basis . . ." otherwise, her rejection "would have been based solely on the supposition of incapability."[81]

Recent judicial, administrative, and arbitral decisions indicate that this issue of legitimate qualification standards is still far from settled. Cases involving the Ohio weight lifting law are an excellent example. The Ohio Industrial Relations Director suspended enforcement of Ohio's multifarious protective laws[82] on September 24, 1969, following a series of EEOC decisions that those laws conflicted with Title VII

78. *Id.* at 5111.

79. Union Fork & Hoe Co., 70-2 CCH Lab. Arb. Awards 5400 (1970) (Kindig, Arbitrator).

80. *Id.* at 5402.

81. *Id.* at 5402-03.

82. OHIO REV. CODE ANN. §§ 4107.42-.53 (Page, 1965), *as amended, id.* §§ 4107.40, .44, .53 (Page Supp. 1970).

and federal case law.[83] Ohio's protective laws were being challenged at that time in no less than eight Title VII cases in federal district courts.[84]

Arbitrators had been relying upon the Ohio weight lifting law to deny grievances by females seeking employment, promotion, or recall from layoff. One arbitrator observed, for example, that even if the female employees had possessed the physical ability to perform the required lifting, they would have been forbidden to do so by state law.[85] Another said that the company "is fully justified in taking the . . . Ohio law into account."[86] He continued, declaring that an arbitrator "cannot properly make an award which would require the company to take action likely to result in a violation of the state law, unless it is the only alternative which the contract itself clearly and specifically presents."[87]

Other arbitrators in Ohio were relying on the original EEOC guidelines, which countenanced state lifting laws (as a bfoq) as long as the standards were not set unreasonably low.[88] However, this particular guideline was invalidated by a federal district court in California on November 22, 1968.[89] The EEOC subsequently issued its present guideline provision, instructing that state protective legislation will not be considered as the basis for application of the bfoq exemption.[90]

One exception was an arbitration award which upheld the griev-

83. *E.g.*, EEOC Case Nos. CL 7-5-604 to -638 (1969), *cited in* CCH EMP. PRAC. GUIDE ¶ 5027, at 3677 n.18 (1970).

84. Testimony of Sonia Pressman, Senior Attorney of Equal Employment Opportunity Council, at a hearing of the Commerce and Labor Committee of the Ohio House of Representatives, Jan. 28, 1970, in CCH EMP. PRAC. GUIDE ¶ 5027, at 3677 (1970). These federal cases culminated in the federal district court decision of Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971), discussed at text accompanying notes 98-99 *infra*.

85. Schaefer Super Markets, Inc., 66-1 CCH Lab. Arb. Awards 3920, 3924 (1966) (Geissinger, Arbitrator).

86. General Fireproofing Co., 67-1 CCH Lab. Arb. Awards 3809, 3814 (1967) (Teple, Arbitrator).

87. *Id.*

88. "[R]estrictions on lifting weights will not be deemed in conflict with Title VII except where the limit is set at an unreasonably low level which could not endanger women." 30 Fed. Reg. 14927 (1965). Arbitrations in which these guidelines were relied upon include: Goodyear Aerospace Corp., 68-2 CCH Lab. Arb. Awards 5077 (1968) (Lehoczky, Arbitrator); Frito Lay, Inc., 66-3 CCH Lab. Arb. Awards 6046 (1966) (Stouffer, Arbitrator); Schaefer Super Markets, Inc., 66-1 CCH Lab. Arb. Awards 3920 (1966) (Geissinger, Arbitrator).

89. Rosenfeld v. Southern Pac. Co., 293 F. Supp. 1219 (C.D. Cal. 1968), *aff'd*, 444 F.2d 1219 (9th Cir. 1971).

90. 29 C.F.R. § 1604.1(b)(2) (1971).

ance of senior female employees who charged that they were entitled to pay for the time worked by junior males, even though the employer had relied on the state lifting law limit to preclude the females' bid.[91] The arbitrator relied on an EEOC bulletin, which read: "An employer must seek all available administrative exceptions to state protective legislation before relying on such laws as a basis for unequal treatment of female employees."[92] In addition to awarding back pay to the grievants for the two positions in question, the arbitrator ordered the company to request the Ohio Department of Industrial Relations "to make an evaluation of all jobs" worked by junior males while senior female grievants were laid off.[93] The other female grievants were to be paid the regular wages for any of these jobs that could have been legally done by senior females who had been improperly laid off instead. In other words, the arbitrator merely found that the company had improperly failed to seek administrative exemptions under the state weightlifting law; he did not seek to skirt the state law itself.

Nevertheless, the Ohio lifting law was still considered a defense to a charge of sex discrimination after *Weeks* and the amended EEOC guidelines. In one case,[94] an arbitrator noted that, while the contract required that all federal and state laws be adhered to, the state lifting law was still valid since any conflicts between it and Title VII had not been resolved. He nevertheless recognized that the law's twenty-five pound lifting limit may have been too low, and that other vague standards in the state lifting law (*e.g.*, "frequent or repeated lifting") needed clarification.

At this juncture in the story of Ohio industrial jurisprudence, state administrative officials announced that the Ohio lifting law would no longer be enforced while court suits were pending. Subsequently, an arbitrator set aside a woman's layoff by an Ohio company.[95] He observed that "it would be an empty gesture to say that the [state lifting] law now retains the same status as a controlling factor that it had prior to the passage of the Federal Act."[96] Thus, since there were serious doubts about the validity of the state law, he ruled that the state lifting law would not bar the company's following the clear terms of the con-

91. Alsco, Inc., 67-2 CCH Lab. Arb. Awards 4304 (1967) (Altrock, Arbitrator).

92. *Id.* at 4309.

93. *Id.*

94. Canton Provision Co., 69-2 CCH Lab. Arb. Awards 5244 (1969) (Altrock, Arbitrator).

95. Gross Distributing, Inc., 71-1 CCH Lab. Arb. Awards 3050 (1970) (Allman, Arbitrator).

96. *Id.* at 3053.

tract (which declared that seniority was to be determined by the length of continuous service, with regard to the individual's experience and ability to perform the work).

To further complicate the situation for Ohio arbitrators, the same Ohio lifting law was both upheld by a state court[97] and voided by a federal court[98] in a two-week span in March of 1971! The federal court reasoned that the law was invalid under the principle of federal supremacy since Title VII demands "that individuals be considered on the basis of their individual capabilities and not on the basis of any characteristics generally attributable to a group."[99] In contrast, the state court observed:

> While it is possible that such [a lifting] prohibition may be unreasonable as applied to some specific female employee, that question is not before the court but, rather, the question is whether or not the prohibition is unreasonable as applied to female employees generally."[100]

The Ohio court concluded that such prohibitions could reasonably be applied to women generally.

3. *A Possible Solution*

A better approach to the conflict between Title VII and state protective laws seems to be that followed in 1969 by an arbitrator interpreting the controversial effect of an Illinois maximum hours for women law (after both *Weeks* and the amended EEOC guidelines).[101] In that case, the company had refused a female grievant's bid on a job requiring overtime. The union contended that the company was required by the no-sex bias clause in the contract to tailor the job to allow women to be promoted by doing away with the overtime requirement for women. The union's approach was rejected by the arbitrator on the theory that to do away with the overtime requirement only for women would violate the no-sex bias clause in the contract since it banned discrimination against any employee (male or female). Rather, he recognized that the real issue "involves a conflict between the federal and state law; and the role of an arbitrator is a determination of

97. Jones Metal Prods. Co. v. Walker, 25 Ohio App. 2d 141, 267 N.E.2d 814 (1971).

98. Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971).

99. *Id.* at 1096.

100. 25 Ohio App. 2d at —, 267 N.E.2d at 820.

101. Simoniz Co., 70-1 CCH Lab. Arb. Awards 3092 (1969) (Howlett, Arbitrator).

that conflict."[102] He was of the opinion that "contracts include all law applicable thereto, hence the arbitrator should apply the law (constitutional, statute, and common) to each collective bargaining agreement," and that, as an arbitrator, he "should apply the law," and that any conflicts "between federal and state law must be resolved in favor of federal law."[103]

This arbitrator took what appears to have been the most realistic approach to the role of arbitration. He concluded:

> I recognize that my Award may cause Simoniz some legal difficulties. Simoniz may follow one of two courses. It may refuse to comply with the Award in which event Local 559 may seek compliance in either a federal or state court. The Court will then determine whether my interpretation of the law is correct, and whether federal or state law will apply.
>
> In the alternative, Simoniz may comply with the Award. In this event, the Illinois Department of Labor may charge Simoniz with breach of the Illinois statute—if the Illinois Department of Labor adheres to its previous opinion that the statute is applicable to Line Operators at the Simoniz plant. Simoniz may defend on the basis of the Civil Rights Act.[104]

The Illinois female maximum hours law was subsequently invalidated by a federal district court in a case involving another company.[105]

Generally, state administrative officials have been reluctant to accept federal court rulings. Many states, for example, appear to be following a "wait-and-see" approach, enforcing their local regulations until a federal court holds that their specific regulations are invalid.[106] Moreover, the attorney generals in two states have issued restrictive opinions that Title VII supersedes the state protective legislation in their respective states only as to those employers covered by Title VII, thus leaving those employers exempted under Title VII still subject to state

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102. *Id.* at 3095.

103. *Id.* at 3095-96.

104. *Id.* at 3098.

105. Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304 (S.D. Ill. 1970).

106. "[U]ntil the Supreme Court of the United States rules otherwise, Kentucky Protective Statutes . . . serve a legitimate purpose. . . ." KY. OP. ATT'Y GEN. (June 26, 1969) in CCH EMP. PRAC. GUIDE ¶ 5079, at 3781-82; *accord* N.C. OP. OF COMM'R OF LABOR (Nov. 25, 1969), *aff'g* N.C. OP. ATT'Y GEN. (Oct. 9, 1967) in CCH EMP. PRAC. GUIDE ¶ 5111 and [1965-1968 Transfer Binder] CCH EMP. PRAC. GUIDE ¶ 8186. Other states, with attorney general opinions upholding their respective protective legislation in 1966 or 1967, have not officially re-examined their protective laws in light of recent federal decisions. *See* MD. OP. ATT'Y GEN. (Jan. 19, 1966) in [1965-1968 Transfer Binder] CCH EMP. PRAC. GUIDE ¶ 8044; 1967 MO. OP. ATT'Y GEN. No. 45 in [1965-1968 Transfer Binder] CCH EMP. GUIDE ¶ 8136.

protective laws.[107]

In contrast, a few states have repealed their protective legislation;[108] attorney general opinions in two other states have held that Title VII supersedes their protective laws;[109] and another attorney general's opinion has added a further protection by ruling that the state protective law was repealed by implication because of the state FEP law.[110]

B. Job Testing

Job testing is another area in which Title VII has had an increasing impact. An employer cannot establish new, spurious qualifications or tests in order to disqualify an unwanted applicant from the "opposite" sex. If there previously were no standards for job applicants, an employer's initiation of strict standards that disqualify an applicant (as well as a disproportionate number of other members of that same sex) will be closely scrutinized.

1. Aptitude Tests

The United States Supreme Court recently ruled (in a race bias case) that aptitude tests must be job related.[111] But even if a pre-employment test is job related, it is often quite subjective with ample op-

107. 1969 MICH. OP. ATT'Y GEN. No. 4687 in CCH EMP. PRAC. GUIDE ¶ 5108; 1970 WASH. OP. ATT'Y GEN. No. 9 in CCH EMP. PRAC. GUIDE ¶ 5073.

108. For example, the Arizona law limiting female working hours to eight per day and forty-eight per week was repealed following an administrative determination by the Arizona Civil Rights Commission on December 2, 1966, that the law violated both Title VII and the state's FEP law. Ariz. Laws, 1970, ch. 69, § 1. The Georgia law restricting weight lifting by female employees to thirty pounds was repealed while the appeal to the Court of Appeals was pending in *Weeks*.

109. 1969 OKLA. OP. ATT'Y GEN. No. 69-304 in CCH EMP. PRAC. GUIDE ¶ 5105; S.D. OP. ATT'Y GEN. (Feb. 27, 1969) in [1968-1969 Transfer Binder] CCH EMP. PRAC. GUIDE ¶ 8080.

110. The state FEP ban on sex discrimination in 1969 "eliminates the need and justification for preferential treatment in the field of employment because of sex by placing males and females on an equal footing." PA. OP. ATT'Y GEN. (Nov. 14, 1969) in CCH EMP. PRAC. GUIDE ¶ 5106. *Contra*, 1969 MICH. OP. ATT'Y GEN. No. 4687 in CCH EMP. PRAC. GUIDE ¶ 5108 (state protective legislation specifically not repealed in Michigan FEP law: "Any such refusal to hire or discrimination shall not be an unfair employment practice if based on law, regulation . . . .") and 1967 Mo. OP. ATT'Y GEN. No. 82 in [1965-1968 Transfer Binder] CCH EMP. PRAC. GUIDE ¶ 8133.

111. Griggs v. Duke Power Co., 401 U.S. 424 (1971). In other words, the Court determined that a test designed to measure skills not related to job performance violates the Title VII ban on race discrimination whenever it is shown that the discriminatory test had a greater disparate effect on blacks than on whites. This prin-

portunity for abuse. For example, an employer could stage a rigged experiment to demonstrate dramatically that members of one sex cannot perform the duties of a job classification filled exclusively by members of the other sex either: (1) by unfairly matching the most experienced employee in a sex-segregated job classification with an inexperienced (or the smallest or weakest or least mechanically inclined) member of the opposite sex; or (2) by intentionally fouling up the performance of one party by providing inferior tools (such as dull bits for a woman attempting to become a drill press*man*).

Just such a situation of biased administration of qualification testing was presented in a 1947 arbitration (long before the passage of Title VII) in which the employer was ordered to rescind his discharge of women who had not been given a fair trial on a job.[112] The employer appeared to have applied stricter standards to the female grievant than to male workers trying out for the same job. Moreover, the evidence indicated that the job was well within her qualifications and that her employment record cast considerable doubt on the employer's claim that she was careless and indifferent.

Arbitrators do not interfere when employers exercise their management right to determine ability and qualifications of employees "fairly and in good faith and without a clear mistake."[113] Tests to determine an applicant's ability have become commonplace, with one analyst pointing out:

> It is well established by now that tests to aid in the determination of whether applicants possess the qualifications for a particular job may be given where (1) they are reasonably related to the requirements of the job, (2) they are fairly and uniformly administered, (3) they are considered along with all other relevant evidence of qualifications, and (4) they are not given prominence out of proportion to other evidence which indicates a contrary view.[114]

One arbitration in point involved a contention by female employees that their union had improperly failed to press their grievance against a company after they were laid off upon failure to pass a proficiency test.[115] The company had a contract with NASA, which in-

ciple would appear to apply also to sex bias, since the effect on a discriminatorily-designed, non-job related test could be to effectively screen out most women on the basis of general lack of specialized mechanical knowledge which the job itself would not require.

112. Chrysler Corp., 8 Lab. Arb. 611 (1947) (Wolff, Arbitrator).

113. CCH LAB. L. REP., UNION CONT. ARB. ¶ 58,538, at 84,113 (1969).

114. *Id.* at 84,112-13.

115. McKnight, 66-3 CCH Lab. Arb. Awards 5815, 5816 (1966) (United Auto Workers Public Review Board).

sisted that any soldering work by a contractee company be done only by employees who could demonstrate a stated minimum level of skill. The union got the company to provide fifty-six hours of specialized training for all current employees in a soldering classification, but all of the women nevertheless failed the test. Subsequently, the union chose not to press the grievance that the test was unnecessary, preferring instead to work amicably with the company to provide for further training and subsequent retesting of women employees. The union review board vindicated the union since, had the union immediately pressed the grievances, through arbitration, the grievants would have been "out for good" being unable at that time to pass the test.[116] Regarding the test itself, the arbitrator stated that the union could not maintain that the company has no right to demand a certain level of skill of its employees.[117]

One aspect of the testing procedure which the arbitrator glossed over was the grievants' charge that all employees in the department "were required to qualify as certified solderers even though some did no soldering whatsoever in their daily work."[118] This test for employees not doing any soldering certainly does not appear to have been job related.

There have been a few other arbitrations in point. In 1969, an arbitrator held that it was not a discriminatory exercise of management's judgment to refuse to give a female grievant a trial on the job for which she was bidding.[119] The contract stated that the senior employee was to receive a trial period on a job if he or she was "qualified." The arbitrator interpreted "if qualified" to mean that "the senior employee must have a background of such training, experience, or demonstrated aptitude and physical makeup, as to give a reasonable person cause to believe that this person can be expected to perform the job competently within a reasonable time."[120] The evidence showed that the female grievant had no experience whatsoever in several critical functions of the job, whereas the less senior male (who got the job) had extensive experience with such work. Thus, grievant's lack of experience rendered her unqualified for the job.

A similar position was taken in 1970 by another arbitrator who

116. *Id.*
117. *Id.* at 5817.
118. *Id.* at 5816.
119. Kingsberry Homes Corp., 70-1 CCH Lab. Arb. Awards 3577 (1969) (Rauch, Arbitrator).
120. *Id.* at 3579.

upheld the layoff of three senior male plant guards while three part-time junior female guardettes were retained.[121] Guards were patrolmen, while guardettes primarily performed clerical duties but also performed guard-related duties. The male grievants argued that the seniority provision in the contract should be interpreted as requiring that senior male guards be permitted to transfer to female guardette positions (thus bumping junior female guardettes) rather than being laid off (while junior female guardettes were retained). Rejecting this claim, the arbitrator noted that only one of the three male grievants indicated an ability to do the work of a guardette (which was mostly clerical in nature), and it was evident that the one making the claim lacked the necessary clerical training.

On the other hand, this arbitrator held in the same case that it was improper for the company to fail to recall two senior men from layoff before hiring two women for guardette positions. The contract provided that employees on layoff were to be recalled for any jobs for which they were qualified. The arbitrator held that these two male grievants were capable of *learning* the work of a guardette, and so they should have been recalled. Recognizing that the company normally assigned women to the position of guardette, the arbitrator determined that the no-discrimination clause in the contract required the company to consider all qualified employees (including men).

2. Physical Examinations

Another common requirement of applicants for employment (especially for blue-collar jobs) is a physical examination. This has been considered a proper exercise of managerial rights (under a standard "Management Clause") "to make sure that its employees are not afflicted with any physical limitation or impairment which may adversely affect their health and safety or those of their fellow workers."[122]

Two arbitral awards in 1966 upheld, against claims of sex bias, a policy of requiring female, but not male, applicants for jobs to submit to physical examinations. One of the arbitrators recognized that "females as a group do not possess the strength and vigor of males and require greater protection against individual risks and hazard than do males."[123] "Hence," he continued, "an employer has the right to con-

121. Wackenhut Corp., 70-2 CCH Lab. Arb. Awards 4766 (1970) (Vadakin, Arbitrator).

122. Olin Corp., 70-2 CCH Lab. Arb. Awards 5876, 5881 (1970) (Anrod, Arbitrator).

123. International Paper Co., 47 Lab. Arb. 896, 898 (1966) (R. Williams, Arbitrator), *citing* Sperry-Rand Corp., 46 Lab. Arb. 961 (1966) (Seitz, Arbitrator).

dition the assignment of females to hitherto all-male jobs upon their passing of a medical or other examination."[124] The second arbitrator, indulging the same presumption, determined that "it is appropriate, when the job calls for greater strength and vigor, to condition assignment of females upon passing medical examinations."[125] In both cases, the jobs involved somewhat heavy work.

Both arbitrators added, however, that employers could not merely bypass women for heavy jobs without permitting them to qualify through medical examinations (and performance tests). Referring to Title VII, the first arbitrator said that the employer "cannot arbitrarily hold them disqualified because they are women";[126] the second, without mentioning Title VII, said that the no-sex bias clause in the contract meant that "the Company cannot select one [of two applicants for a job] because he is male and reject the other because she is female."[127]

A sex-based difference in the timing of physical examinations has been held by the EEOC to violate Title VII.[128] Male production employees were given back x-rays as part of their entrance physical examinations, while female production employees were not given back x-rays unless and until they later bid on "heavy" (male) jobs. The EEOC determined that while it was "not unreasonable" for women employees to be required to have back x-rays before they could be assigned to jobs involving heavy lifting, such x-rays must be given to women at the same time they are given to men in conformance with the requirements of *Bowe*.[129] Otherwise, a male employee "at the time he was hired . . . could predict with more confidence than a newly hired female employee whether or not certain positions would be foreclosed to him in the future because of his health."[130]

Physical examinations have also lent themselves to discrimination on the basis of sex-based differences in physical makeup. Height and weight restrictions are good examples since men on the average are considerably taller and heavier than women and the requirements often have little or nothing to do with job performance. The unfairness of such policies was recognized by a state appellate court upholding a

124. *Id.*
125. Sperry-Rand Corp., 46 Lab. Arb. 961, 965 (1966) (Seitz, Arbitrator).
126. 47 Lab. Arb. at 898.
127. 46 Lab. Arb. at 964.
128. EEOC Decision No. 71-1332, CCH EMP. PRAC. GUIDE ¶ 6212 (Mar. 2, 1971).
129. Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).
130. CCH EMP. PRAC. GUIDE at 4362.

New York State Human Rights Commission decision that sex discrimination resulted from a baseball league's rule requiring an umpire to be at least five feet ten inches tall and no less than 170 pounds.[131] The appeals court said: "While undoubtedly height and weight are important in judging a person's ability to withstand physical strain, it has not been demonstrated that persons 5′ 10″ and over are the only people capable of withstanding such strain,"[132] especially in light of evidence that there have been umpires in the past who didn't meet these standards.

Similarly, the EEOC has stated: "Where, as here, an employment policy has a foreseeable disproportionate impact upon members of a group protected by Title VII, the employer must show that the policy is so necessary to the safe and efficient operation of his business as to justify the policy's discriminatory effects."[133] Noting that the employer did not attempt to show a business necessity for its rule requiring a minimum height of five feet six inches for persons in production jobs, the EEOC cited the Statistical Abstract figures as to relative heights of men and women.[134]

Arbitrators have not been presented with sex discrimination cases involving bogus physical requirements. However, an arbitrator (in a case not involving sex bias issues) has construed contract provisions on "qualifications" in relation to "capabilities to perform the job."[135] Accordingly, he noted that the company "could not validly specify a minimum six-foot height or a maximum 150-pound weight for each applicant for a posted job unless such height and weight have a reasonable relationship to the necessary capabilities to perform the particular job to be filled."[136]

131. New York State Div. of Human Rights v. New York-Pennsylvania Professional Baseball League, 36 App. Div. 2d 364, 320 N.Y.S.2d 788 (1971).

132. *Id.* at 369, 320 N.Y.S.2d at 794.

133. EEOC Decision No. 71-1529, CCH EMP. PRAC. GUIDE ¶ 6231, at 4411 (Apr. 2, 1971).

134. *Id.* The EEOC, in an earlier racial discrimination case, had noted in dictum that if a company's height requirements "serve to screen out qualified females" then Title VII is violated. In the particular case, the EEOC determined that the height requirements applied only to females and also that several women of lesser height (who had been hired prior to the promulgation of the minimum height rule) were satisfactorily performing the job on which complainant was bidding. EEOC Case No. YCL 9-006, CCH EMP. PRAC. GUIDE ¶ 6093, at 4142 (1969).

135. Ball Bros. Co., 66-2 CCH Lab. Arb. Awards 5097 (1966) (Kates, Arbitrator).

136. *Id.* at 5100.

C. Marital Status

Another frequent sex-based employment practice is the disqualification of married applicants or employees. Title VII does not expressly bar discrimination on the basis of marital status; nor does any state FEP law except New Jersey's.[137] Thus, a blanket ban on married employees, which is applied to both sexes, is not an illegal employment practice except in New Jersey. In order for an employer's policy to constitute sex discrimination under federal law, there must first be a "no-marriage" policy applied to one sex but not to the other and, second, a failure by an employer to establish that a "no-marriage" policy applied to only one sex is a bfoq for that particular job.

Labor contract provisions banning discrimination on the basis of an employee's marital status have not been common.[138] For example, a 1965 study of the incidence of antidiscrimination clauses in labor contracts in Iowa one year after the passage of Title VII turned up only one provision banning discrimination because of marital status in the 153 labor contracts examined (as compared to 46 of the 153 contracts containing a ban on sex discrimination generally).[139] Moreover, a 1954 compilation of representative clauses from labor contracts not only contained no provision banning marital status discrimination but also listed two provisions patently discriminatory toward married women.[140] One read: "The company agrees not to hire nor continue in employment married women, unless such married women have no other means of support."[141] The other read: "The company agrees to adopt and maintain as a part of its labor policy that the marriage of any female employee (hereafter employed) shall terminate her employment with the company."[142]

Contemporary labor contracts in the airline industry are another example, having made single status a condition of employment, with subsequent marriage considered cause for termination. The force of such rules has fallen squarely on females, since the airlines' no-marriage bans have been applied primarily to the predominately female flight

137. 10 N.J. REV. STAT. § 5(12)(a) (Supp. 1970).

138. *But see, e.g.*, the labor contract at the Rockwell Manufacturing Company: "The policy of the Company, the Union and its local is not to discriminate against any employee on account of . . . marital status . . . ." Rockwell Mfg. Co., 70-1 CCH Lab. Arb. Awards 4124, 4125 (1970) (Duff, Arbitrator).

139. Wortman & Luthans, *The Incidence of Antidiscrimination Clauses in Union Contracts*, 16 LABOR L.J. 523, 530 (1965).

140. COMMERCE CLEARING HOUSE, INC., UNION CONTRACT CLAUSES 764 (1954).

141. *Id.*

142. *Id.*

cabin attendant position (*i.e.*, stewardesses and stewards) and have been applied more rigorously against stewardesses than against similarly-situated stewards.

The EEOC's position on marital status is that an employment policy adversely affecting married women, while not being applicable to married men, constitutes sex discrimination in violation of Title VII. The stated basis for this conclusion is not that a marriage restriction itself violates Title VII but that the marriage restriction "is applied to females and not to similarly placed males."[143] As enunciated in its guidelines, the EEOC declares: "It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex."[144] The EEOC conceded, however, that there "may" be "certain circumstances" in which such a rule "could be justified" as a bfoq.[145] While it expressed "no opinion on this question," the EEOC did point out that sex as a bfoq cannot be justified on the basis of "a general principle such as the desirability of spreading work."[146]

The issue of sex discrimination because of marital status has not yet reached the Supreme Court. The only court of appeals to rule on the question is the Court of Appeals for the Fifth Circuit. It held, in *Lansdale v. Air Line Pilots Association International*,[147] that the district court erred in dismissing a complaint alleging that the stewardesses' union violated Title VII by, in the district court's words, "caus[ing] an employer . . . to allow its [stewards] the privilege of marriage while denying this same privilege to its [stewardesses] within the same classification."[148] The court of appeals determined that the district court ruling would permit sex bias "without the requisite finding which must support such a conclusion—that the same is a bona fide occupational qualification."[149] The airline-union agreements were deemed unlawful since they "aided, abetted, condoned and caused the unlawful employment practice of applying a different standard of compensation, condition of employment between its female flight cabin attendants and its male flight cabin attendants and other employees."[150]

143. EEOC Case No. YSF9-060, CCH EMP. PRAC. GUIDE ¶ 6011, at 4031 (1969).
144. 29 C.F.R. § 1604.3(a) (1971).
145. *Id.*
146. *Id.* § 1604.3(b).
147. 430 F.2d 1341 (5th Cir. 1971).
148. *Id.* at 1342.
149. *Id.*
150. *Id.*

One pre-Title VII arbitral award held that discharge of female employees solely because they were married was not discharge for "proper cause."[151] Noting that marriage was not a ground for discharge of male employees, the arbitrator held that there is a basic principle, in the absence of special provisions to the contrary, that all employees have equal rights under labor contracts.

Arbitration generally has not been of significant value in outrightly combatting sex discrimination on the basis of no-marriage policies. One system board of adjustment, charged with arbitration of contract disputes in the airline industry, has stated, for example: "The jurisdiction of this System Board does not extend to interpreting and applying the Civil Rights Act."[152] It has also said that "The Board . . . derives its authority under the Contract and, therefore, limits its discussion to its jurisdiction under it."[153]

Most arbitrations have involved strictly contract interpretation, with the question being whether the no-marriage ban was applicable to the dispute at hand. However, one case squarely presented the sex bias issue, since the airline in question terminated married stewardesses but not married stewards.[154] The system board, in upholding the female grievant's discharge because of her marriage as being for "just cause," rationalized that the stewards were used only in the airline's Hawaiian operation and were kept on separate seniority lists.[155] Noting that grievant was terminated under a long-established and consistently administered policy of the company that the stewardesses' union had acquiesced in, the board stated that its jurisdiction "does not extend to interpreting and applying the Civil Rights Act."[156] The board noted that grievant had filed a complaint with the EEOC, and implied that grievant's remedy for sex discrimination would have to be pursued under Title VII rather than with the board.

One board of arbitration interpreted one airline's contract to mean that the case of each stewardess must be considered and judged by it in good faith on an individual basis, rather than authorizing a

151. Tennessee Coal, Iron & R.R., 11 Lab. Arb. 1062, 1065 (1948) (Seward, Arbitrator).

152. United Air Lines, Inc., 67-1 CCH Lab. Arb. Awards 3720, 3726 (1967) (Kahn, Referee).

153. Allegheny Airlines, Inc., 67-1 CCH Lab. Arb. Awards 3854, 3857 (1967) (Kelliher, Referee).

154. United Air Lines, Inc., 67-1 CCH Lab. Arb. Awards 3720 (1967) (Kahn, Referee).

155. *Id.* at 3727.

156. *Id.* at 3726.

blanket policy of automatic termination of all stewardesses upon their marriage.[157] The contract read that the company "may, at its option," terminate stewardesses after six months of their marriage.[158] The board noted that during the contract negotiations the parties had agreed that the no-marriage policy as applied by the airline was a premature measure used to discharge stewardesses who "[got] out of line," and was not enforced merely because of a change in marital status.[159] The board, in effect, formalized company procedures by holding that a married stewardess could be terminated because of her marital status, but only upon a showing that her marital status interfered with the efficient performance of her duties.

In two other cases in which the system board held that discharges of married stewardesses were not for "just cause," the board found that the marital ban was inserted into individual employment contracts notwithstanding the fact that the airline-union's contract contained no such provision. In one of these cases,[160] the board intimated that its failure to enforce the individual contracts was influenced by the recent passage of Title VII, which the board characterized as representing "the modern trend of thought."[161] The board left it to the parties to negotiate regarding the point of marital bans in its new contract, as they had by the time of this decision. The new agreement gave the airline the option to terminate stewardesses after six months of marriage (or upon pregnancy). The board was "impressed" with this new agreement.[162] Presumably, the board would be willing to insist that the airline not use this provision to automatically terminate all stewardesses upon their marriage without individual consideration of what effect marriage had on the efficiency of each stewardess' job performance. The board's short-sightedness regarding the pregnancy issue is discussed in another section of this paper.

In the other case,[163] a board found that the no-marriage rule was unreasonable on the theory that "[u]nreasonable restrictions upon

157. American Airlines, Inc., 67-1 CCH Lab. Arb. Awards 4236 (1967) (Seitz, Arbitrator).

158. *Id.* at 4237.

159. *Id.* at 4240, 4243.

160. Braniff Airways, Inc., 65-2 CCH Lab. Arb. Awards 5434 (1965) (Gray, Arbitrator).

161. *Id.* at 5435.

162. *Id.*

163. Allegheny Airlines, Inc., 67-1 CCH Lab. Arb. Awards 3854 (1967) (Kelliher, Referee).

marriage are against public policy."[164] Noting that this airline had no experience in employing married stewardesses, the board found that despite the fact that several other airlines had employed married stewardesses "there was no showing based on any industry study that married Stewardesses have proved to be less dependable than unmarried Stewardesses."[165] Characterizing the no-marriage policy as "unreasonable," the board determined that the policy's "justification as a safety measure is minimal" and that its "value as a sales promotion device is doubtful."[166]

D. Sexual Intimacy

The bfoq exemption has arisen most frequently in matters involving sexual intimacy. This matter has yet to be adjudicated in the courts, but decisions by the EEOC and by arbitrators have generally taken a realistic approach to protect privacy and individual dignity.

1. Sex-Segregated Facilities

State regulations typically provide that an employer must provide sex-segregated facilities for its employees. Most commonly this means restrooms, but, depending on the nature of the job, it can also mean berthing facilities as well as showers and locker rooms. Such regulations obviously are valid under Title VII and state FEP laws. In this regard, the EEOC general counsel has opined that Title VII applies only to employee status and consequently has no effect on regulations requiring separate rest rooms for men and women. Such regulations are in the interest of public health or safety as well as community morality.[167]

Employers cannot, however, use the prohibitive cost of installing separate "female" facilities as a smoke screen in refusing to hire their first female employees. Rather, each situation must be based on its individual facts. The EEOC guidelines state in this connection: "The fact that the employer may have to provide separate facilities for a person of the opposite sex will not justify discrimination under the [bfoq] exception *unless the expense would be clearly unreasonable.*"[168] Thus, a cost accounting analysis could be instrumental in determining what

164. *Id.* at 3857.
165. *Id.*
166. *Id.* at 3857-58.
167. EEOC Op. Gen. Counsel (Sept. 9, 1965), *reported at* CCH EMP. PRAC. GUIDE ¶ 1219.43.
168. 29 C.F.R. § 1604.1(a)(1)(iv) (1971) (emphasis added).

is reasonable and what is unreasonable under particular circumstances. The EEOC decisions to date have not dealt with the question of number quotas, but have turned instead on a finding that the employer was not making a good faith attempt to provide the facilities.[169]

Pre-Title VII arbitral awards accepted without question that state "facilities" regulations excused discrimination against women. For example, one arbitrator upheld an employer's refusal to recall female employees to foundry jobs after a state agency announced resumption of enforcement of female protective regulations.[170] The arbitrator noted that retention of the women would have necessitated the employer making capital expenditures to provide certain safeguards (including toilet facilities). Moreover, installation of these facilities would cause interruption of the employer's manufacturing processes.

Carrying the excuse to an extreme, another employer removed all toilet and locker room facilities for female employees as part of a large-scale renovation of his physical plant. An arbitrator upheld the subsequent discharge of all female employees (numbering four out of the total of 125 employees), since they ceased to be "suitable" employees after the renovation was completed.[171] The employer was considered

169. *See, e.g.*, EEOC Decision No. 70-558, CCH EMP. PRAC. GUIDE ¶ 6137 (1970). An employer offered the excuse that he would have to hire at least twenty to twenty-five female welders to make installation of female rest rooms and locker facilities "economically feasible." *Id.* However, the EEOC discovered that there had been separate facilities during World War II when many females were employed and that the main water and sewer lines still existed on the employer's premises. Thus, the real question was the cost of the *reinstallation* of the facilities, and the existence of the main water and sewer lines would spare the employer major cost factors.

The maritime industry has been the major battleground on the issue of separate facilities. The EEOC has determined that (the male) sex is not a bfoq for crew positions aboard passenger ships. EEOC Decision No. 70-375, CCH EMP. PRAC. GUIDE ¶ 6081 (1969). Crew members on ships share cabins and bath facilities as a matter of economics. The EEOC unsurprisingly characterized the ship companies' policy of not berthing members of different sexes in the same cabins as being "a reasonable qualification for crew members not married to one another." *Id.* at 4123. Discounting management's reliance on Coast Guard regulations which declare "*[W]here practicable*, crew spaces shall be located entirely separate and independent of spaces allotted to passengers or licensed officers." 46 C.F.R. § 72.20-10(f) (1971) (emphasis added), the EEOC determined that those regulations do not preclude the making of those reasonable efforts to accommodate female employees necessary for compliance with Title VII. CCH EMP. PRAC. GUIDE ¶ 6081, at 4124. Accordingly, the EEOC suggested that passenger staterooms on undersold voyages could be used as emergency quarters "where otherwise practicable or reasonable." *Id.* However, the EEOC did not require management to utilize passenger rooms for crew members on a voyage that is fully booked. *Id.*

170. Cooper-Bessemer Corp., 25 Lab. Arb. 146 (1955) (Meredith, Arbitrator).

171. San Francisco Club Institute, 23 Lab. Arb. 454 (1954) (Wyckoff, Arbitrator).

to have satisifed his requirement (under the contract) of using "good judgment" in discharging employees, since the purpose of the renovation was to obtain maximum utilization of limited space and increase efficiency, and not to discriminate against female employees as such.[172]

Likewise, an arbitrator has recently ruled that Title VII, when read in the light of "reason and practicality," does not require an employer to accept an otherwise qualified female applicant in an all-male plant when it is clear that only a few other females could ever meet the physical requirements of the job, *i.e.*, unsuitable heavy labor.[173] Since state law would require erection of seats for female employees as well as separate restroom facilities, the arbitrator ruled that it would be unreasonable for the company to have to provide the required facilities under these circumstances for so few. Unfortunately, no guidelines were suggested as to how many qualified females would need to apply within a period of time before an employer would no longer be justified in refusing to hire females on the basis of having to erect separate facilities for them.

2. Restroom Attendant

One of the most commonly cited examples of a position in which sex is a bfoq is that of a restroom attendant.[174] However, every type of restroom attendant does not automatically come within the bfoq exception—which under *Weeks* and the EEOC guidelines is to be interpreted narrowly. The one type of restroom attendant clearly coming within the bfoq exception is that rarity in which the attendant provides personal services for persons inside the restroom. The typical example is a male stationed in a men's room in swanky establishments in large metropolitan areas to dole out hand towels for a tip. Obviously, sex is a bfoq in this instance, since the attendant is stationed inside the restroom at all times.

Certain limitations have been placed on the bfoq exemption's application to rest room attendants of a janitorial type, however. For example, the EEOC has held that sex is not a bfoq for the position of a lifeguard at a swimming pool, even though the duties included cleaning both the men's and women's locker rooms.[175]

172. *Id.* at 455-56.

173. Weirton Steel Co., 68-2 CCH Lab. Arb. Awards 4683, 4687 (1968) (Kates, Arbitrator).

174. *See, e.g.*, N.Y. Guidelines for Applying Sex Discrimination Law § D(1)(b), in CCH EMP. PRAC. GUIDE ¶ 26,053 (1971).

175. EEOC Decision No. 70-286, CCH EMP. PRAC. GUIDE ¶ 6077 (1968). The hotel had refused to hire a female on the basis that most of the hotel's guests were

An arbitrator likewise refused to consider sex a per se bfoq for the position of attendant for the opposite sex's locker room.[176] However, relying upon an EEOC booklet, he held in a significantly different factual situation that sex is a bfoq for the janitorial position of locker room attendant when the attendant's duties would have to be carried out periodically during the day when the locker rooms would be in regular use by patrons of the opposite sex. The locker room in question was characterized as "an around-the-clock operation" in constant use by male customers and employees during the regular working hours.[177] Consequently, the arbitrator concluded that it would be an unreasonable disruption of production to expect a female attendant to step out every time a male wanted to use the male locker room, since it certainly would be "a considerable violation of community standards of morality or propriety to have a person of one sex using a toilet or locker room while a person of the other sex was present."[178] Thus, he dismissed the female's grievance which charged that she had improperly been denied the overtime assignment of cleaning the male locker room during a holiday season. Her regular job was to clean both the male and female locker rooms only on an after-hours basis. The arbitrator went on, however, to say in dictum that the same standard must be applied to male attendants cleaning a locker room in constant use by female employees. The clear implication in his arbitral award was that while sex may be a bfoq for a restroom attendant during the normal office hours it is not a bfoq when the same duties are performed after the normal working hours when the restroom would be used only infrequently.

3. Restroom Privileges

A company's rule requiring employees to punch in and out when going to the restroom was considered by an arbitrator to be unreasonable.[179] Pegging his decision on the policy constituting a trespass

males, and she obviously could not perform the necessary tasks of cleaning the male's locker room. The EEOC's answer simply was: "It is obvious that, if a male can clean the women's locker room, a female can clean the men's locker room."

176. Corn Products Co. Int'l, CCH Lab. Arb. Awards 4410 (1970) (Gross, Arbitrator); *accord*, Hercules Powder Co., 45 Lab. Arb. 448 (1965) (Shafer, Arbitrator) (women's restroom dirty during day until male janitor cleaned after hours; janitoress replacement upheld).

177. 70-1 CCH Lab. Arb. Awards at 4413.

178. *Id.* at 4414.

179. Gremar Mfg. Co., 66-1 CCH Lab. Arb. Awards 3008 (1965) (Teele, Arbitrator).

into areas of personal dignity, the arbitrator nevertheless discussed the case in terms of the especially adverse impact of the rule upon women employees. Concluding that special problems arose with females working under the close supervision of male foremen, he ordered the company to abolish this practice, notwithstanding company claims that the policy was necessary for purposes of cost accounting. Any alternative efficiency-oriented plan would require safeguards "to eliminate discrimination, to protect the privacy of the individuals concerned, and to avoid undue embarrassment to these individuals."[180]

4. Intimate Nursing Care

An arbitrator has ruled that a hospital does not violate Title VII in refusing to permit male licensed vocational nurses (hereinafter called nurses) to perform duties involving sensitive personal care of female patients.[181] The hospital's policy was based upon its "assessment of the proclivities of its female patients," to wit that some female patients consider it "a highly offensive indignity" to be given sensitive personal care by male nurses.[182] By accepting the hospital's position that it "must anticipate what those who must avail of nursing care in its beds will be willing to tolerate,"[183] the arbitrator thereby accepted customer preference as a bfoq. This approach is contrary to the EEOC Guidelines, but in line with the district court decision in the *Diaz* case which was subsequently reversed.[184]

Conceding that this approach was discriminatory against the male nurses, the arbitrator maintained that a contrary decision would result in discrimination against those female patients "subjected to the routine but unwanted ministrations of male [nurses]." Noting that discrimination *per se* is not always improper, he declared that Title VII, as well as the hospital's collective bargaining agreement with the nurses, bars only invidious discrimination that reflects on the dignity of those involved. Consequently, he felt that the hospital acted appropriately in choosing to protect the personal privacy of female patients, even at the expense of maintaining discriminatory employment practices against male nurses.

The arbitrator noted that in this particular situation there were

180. *Id.* at 3013.

181. Kaiser Foundation Hosps. & Servs. Employees, 67-2 Lab. Arb. Awards 4665 (1967) (Jones, Arbitrator).

182. *Id.* at 4670.

183. *Id.*

184. Diaz v. Pan American World Airways, Inc., 311 F. Supp. 559 (S.D. Fla. 1970), *rev'd*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 40 U.S.L.W. 3212 (1971).

other hospitals covered by this collective agreement in which there would be a work mix not requiring intimate care of female patients, and thus ordered the grievants to be reinstated as nurses. He suggested furthermore that preferential treatment for male nurses would be a proper consideration in making job assignments in other hospital units not requiring intimate care of female patients.

The arbitrator's award countenanced assignment of nurses on the basis of sex, a situation prohibited by Title VII if sex is not a bfoq for the position, but he failed to deal squarely with the bfoq issue. He did not mention the possibility of male patients' personal dignity being offended when they are given sensitive personal care by female nurses. The logical extension of the award would be that male patients can insist on male nurses, and that assignments must be made accordingly. Otherwise, there would be a double standard, which is surely unacceptable.

III. Working Conditions

Closely related to the question of the bfoq exemption, which "excuses" otherwise illegal sex discrimination in hiring employees, is the question of an employer applying sex-based differentials in the terms or conditions of employment. As discussed earlier,[185] Title VII prohibits preferential treatment on the basis of sex, and that is as true concerning working conditions as it is with respect to qualifying for employment. The EEOC guidelines do not cover working conditions generally, but they do refer to specific situations (such as sex-based differences in optional or compulsory retirement ages).[186] The EEOC's basic approach is that if, for example, employers provide specified lunch breaks and rest periods, then they must provide these conditions to all of their similarly situated employees.[187] Title VII would be violated if a company provided breaks for employees of one sex but not for those of the other.

Generally, arbitrators since 1965 have been especially mindful of this Title VII proscription on preferential treatment for women. They have been particularly critical of women attempting to skirt heavy lifting duties. One arbitrator upheld the firing of a woman grievant who had refused a work order to handle materials weighing sixty-eight pounds and who claimed that it was "man's work."[188] The record

185. See text accompanying notes 36-39 *supra*.

186. *E.g.*, 29 C.F.R. § 1604.31(a) (1970).

187. *See, e.g.*, EEOC Case No. 6-8-6654, CCH EMP. PRAC. GUIDE ¶ 6021 (1969).

188. Star Box & Printing Co., 69-2 CCH Lab. Arb. Awards 5332 (1969) (Bladek, Arbitrator).

showed, however, that the materials were split into two thirty-four pound bundles, which the arbitrator found to make the work "not too difficult." Moreover, none of grievant's seven similarly-situated female co-workers complained about the work assignment. "Ability to perform a job is a contractual requisite of job right in the application of seniority rules," is how one arbitrator put it.[189] In the dispute at hand, the company's layoff procedure kept senior women from being laid off into a general labor pool, an "all-male" classification requiring heavy work. Instead, they were laid off. Transfer of the women into the labor pool would, in the company's estimation, "either require the assignment of women to unsuitable heavy labor or it would require the company to permit them to pick and choose jobs when reduced from their home sequence. This is something denied men and would be discriminatory against men and would violate the contract."[190] Similarly, another arbitrator remarked that the contract did not permit an individual to bump into a classification "when he is physically fit to perform only the lighter and less demanding tasks of the occupation.[191] Continuing, he recognized that a company "is not obligated to 'tailor' the job to the displacing employee."[192]

Another arbitrator, following this same basic approach, added: "[A] company is not obligated to carve out a new classification for the layoff occasion or to put an employee in an existing classification and administer onerous work assignments away from her."[193] One company had done just that, by eliminating from the only female's job requirements any duties involving heavy lifting. Contending that this preferential treatment violated the no-sex bias provision in the contract, her male co-workers filed a grievance which was upheld by an arbitrator.[194] He rejected the company's claim that it could divide the duties among the employees "in any way that efficiently carries out the work of the [d]epartment;"[195] declaring instead that such "is true only to the extent that there is no unjust discrimination to either sex."[196] In

189. Weirton Steel Co., 68-2 CCH Lab. Arb. Awards 4683, 4685 (1968) (Kates, Arbitrator).

190. *Id.* at 4684.

191. Sperry-Rand Corp., 46 Lab. Arb. 961, 964 (1966) (Seitz, Arbitrator).

192. *Id.*

193. Eastex, Inc., 70-2 CCH Lab. Arb. Awards 5109, 5111 (1970) (White, Arbitrator).

194. Rockwell Mfg. Co., 70-1 CCH Lab. Arb. Awards 4124 (1970) (Duff, Arbitrator).

195. *Id.* at 4126-27.

196. *Id.* at 4127.

other words, the company must afford uniform treatment to all employees within a classification since "both the present Contract and Federal Statute prohibit any favoritism to either sex."[197] Accordingly, he postulated three alternatives for the company to correct the violation of the contract: (1) assign everybody (including this female) in this position "to participate in the heavy lifting activities which have been included in the content of this job for some time"; (2) "create a new job, classify it and post it for bidding"; or (3) "relieve all Parcel Post Shippers of heavy lifting and assign such work to other classifications."[198]

The leading case in this area involved sex-based differentials in private pension plans,[199] with the court noting that: "[I]n determining and implementing the terms, conditions or privileges of employment, any differentiation between employees of different sexes must rest upon something more than the fact that one employee is a male and the other is a female."[200] Thus, the *Phillips* standard precluding the application of different employment policies for men and women clearly is applicable to this area of working conditions.

A. Maternity Leaves of Absence

By virtue of female physiology, the multifaceted question of according maternity leaves—as opposed to outright termination of pregnant employees—presents issues of sex discrimination applicable to female employees only.[201] Neither Title VII nor any state FEP law ex-

197. *Id.*

198. *Id.*

199. Rosen v. Public Serv. Elec. & Gas Co., CCH EMP. PRAC. GUIDE ¶ 8073 (D.N.J. 1970), *on remand from* 409 F.2d 775 (3d Cir. 1969). *See also* Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1971), *cert. denied*, 40 U.S.L.W. 3219 (No. 71-321, Nov. 9, 1971), which held that differential retirement ages are a "condition of employment" which are illegal under Title VII.

200. *Id.* at 6213. The court continued: "An employer, to justify discrimination in this area, must demonstrate to the Court that there is [in fact] a reasonable basis that the differentiation between male and female in the company pension plan is based on something more than just sexual differences . . . . Defendant has advanced no such difference. Why should women be allowed to retire earlier than men—at full pension? Are these differentiations based on merit? Quality or quantity of service? Aptitude? Need? These questions remain unanswered." *Id.*

201. A 1954 compilation of representative clauses from labor contracts concluded that "[a] majority of agreements providing for leave of absence for illness or other good cause may be presumed to cover maternity. However, in situations where the allowable period of absence for illness without loss of seniority is of brief duration, maternity leave is effectively precluded. . . .

. . . .

The period of absence for maternity leave varies considerably. In some agree-

pressly bans employment discrimination on the basis of an individual being pregnant.

The EEOC has taken the basic position that pregnant employees must be offered the alternative of a maternity leave of absence instead of being automatically terminated.[202] Since maternity is a temporary disability unique to the female sex,[203] and more or less to be anticipated during the working life of most women employees, the EEOC feels that pregnant employees cannot *ipso facto* be terminated "except [possibly] where the position is one which cannot be left vacant or filled on a temporary basis during the employee's anticipated absence."[204] Noting that termination of pregnant females has an adverse effect upon the conditions of females' employment, without an equivalent effect upon males, the EEOC has determined that only an employer's showing of business necessity can justify an employer's refusal to grant maternity leaves of absence.

A federal district court in *Schattman v. Texas Employment Commission,*[205] the first judicial pronouncement on the issue of maternity leaves, recently upheld by implication the EEOC's basic premise that Title VII precludes termination of employees solely because of their pregnancy. The precise issue decided was that Title VII is violated by an employer's maternity leave policy requiring all pregnant employees to begin their leaves two months before their expected delivery date.[206] In other words, employers cannot satisfy Title VII merely by the granting of a uniform maternity leave which does not take into account individual capacities or characteristics, since "the law no longer permits . . . employers . . . to deal with women as a class in relation to employment to their disadvantage."[207] The court thus went further

ments, the amount of permissible leave is indicated; in others, an employee is required to take a specified period before and after the expected date of delivery, with extensions permitted when necessary." COMMERCE CLEARING HOUSE, INC., UNION CONTRACT CLAUSES 252-53 (1954).

202. *See, e.g.,* EEOC Decision No. 70-600, CCH EMP. PRAC. GUIDE ¶ 6122 (1970).

203. EEOC Decision No. 70-360, CCH EMP. PRAC. GUIDE ¶ 6084, at 4130 (1970).

204. EEOC Decision No. 70-600, CCH EMP. PRAC. GUIDE ¶ 6122, at 4217 (1970).

205. CCH EMP. PRAC. GUIDE ¶ 8146 (W.D. Tex. Mar. 4, 1971).

206. *Id.* at 6460.

207. *Id., quoting* Richards v. Griffith Rubber Mills, 300 F. Supp. 338, 340 (D. Ore. 1969). The court noted that women were being temporarily terminated "not because of their unwillingness to continue work, their poor performance, or their need for personal medical safety, but because of a condition attendant to their sex." *Id.* The court continued: "This is not to say that . . . [an] employer cannot have such a policy [of requiring pregnant employees to take a maternity leave before delivery] based on individual medical or job characteristics, but it does mean that broad policies not so justified are contrary to law." *Id.*

than the EEOC, which has considered reasonable an employer's mandatory maternity leave commencing ninety days before the expected delivery date.[208]

Arbitrators, on the other hand, in sticking to contract interpretation, have been of no assistance to pregnant employees subject to various discriminations. For example, where a contract permitted an employer to grant leaves of absence at his discretion, an arbitrator in 1952 interpreted the provision to countenance an employer's refusal to grant maternity leaves.[209] Determining that under the circumstances pregnancy was "a proper cause for discharge," he noted that the company insists on "the orderly discharge of duties" along with "as full a measure of continuity of work as is possible." Moreover, "being a commercial institution [the company] may go only so far in assisting individual employees as it cares."[210] Subsequently, Title VII has put a burden on employers to reasonably accommodate the individual needs of its employees or potential employees. Even so, arbitrators have taken the position that maternity leaves are not required if they are not specifically provided for in a contract.[211] Yet, in one case,[212] an arbitrator did refuse to uphold the discharge of a pregnant employee. The employee had taken an unauthorized leave when the company denied her request for a maternity leave, even though her pregnancy was aggravated by arthritis. Since there was no maternity leave provision in the contract, the company considered her to be a "voluntary quit." However, the arbitrator, noting her "obvious and known condition," determined that the company's policy of granting leaves under such aggravated physical circumstances should have been followed in her case. This decision, which was rendered just prior to the effective date of Title VII, certainly was a forerunner of the current philosophy and stance of the EEOC.

Other arbitration awards have involved company policies requiring maternity leaves to commence at a certain calendar date. Instead of questioning the nonindividualized treatment, arbitrators have re-

208. EEOC Op. Gen. Counsel, CCH EMP. PRAC. GUIDE ¶ 1219.17 (1966).

209. Texas Co., 19 Lab. Arb. 709 (1952) (McGraw, Arbitrator).

210. *Id.* at 710.

211. Chattanooga Box & Lumber Co., 65-1 CCH Lab. Arb. Awards 3682, 3684-85 (1965) (Tatum, Arbitrator). *See also* Westinghouse Elec. Corp., 45 Lab. Arb. 621 (1965) (Herbert, Arbitrator). Here, the arbitrator—in upholding the termination of a pregnant employee as a "voluntary quit"—pointed out that the employer had demonstrated an established practice, known to the union, of terminating pregnant employees.

212. Western Battery & Supply Co., 65-2 CCH Lab. Arb. Awards 4832 (1965) (Linn, Arbitrator).

stricted themselves to contract interpretation. In one case,[213] an arbitrator held that there was "just cause" for discharge of an employee who failed to timely report her pregnancy to her superior as required in the contract. Another arbitrator[214] determined that employees on a mandatory six-month maternity leave are not entitled to full paid vacations since the contract exempted from vacation benefits those employees on layoff or illness in excess of sixty days during the calendar year. Opining that maternity leave is a layoff, he further observed that giving females on six month maternity leave the same vacation benefits as those on the job during the full year would be giving them something for nothing.[215]

Faced with a contract provision for automatic termination of airline stewardesses upon their becoming pregnant, a board of arbitration determined that it lacked the authority to refuse enforcement of that particular provision, even though the EEOC had determined that the provision was illegal under Title VII.[216] The EEOC's position was that the company should grant maternity leaves in addition to the leaves of absence for sickness or injury authorized under the collective bargaining agreement. No further action was taken in that case after the EEOC failed to conciliate the matter. The grievants requested the board of arbitration to determine that pregnancy is a sickness or injury subject to sick leave tenure; but the board refused, stating instead: "Pregnancy is a normal, healthy condition resulting in temporary disability but is not health, injury, sickness or special assignment within the meaning of [the sick leave provision]."[217] One of the arbitrators agreed that the employer had properly denied full vacation credit to an employee on a mandatory maternity leave under a contract authorizing a maximum of six month's maternity leave.[218] Taking notice of two unsuccessful attempts to amend the contract to grant full vacation benefits to employees on maternity leave, he agreed that the com-

213. R & G Sloane Mfg., 68-1 CCH Lab. Arb. Awards 3594, 3596 (1968) (Roberts, Arbitrator).

214. Clean Coverall Supply Co., 66-2 CCH Lab. Arb. Awards 5507 (1966) (Whitney, Arbitrator).

215. *Id.* at 5513. Neither Schattman v. Texas Employment Comm'n, CCH EMP. PRAC. GUIDE ¶ 8146 (W.D. Tex. Mar. 4, 1971), nor the EEOC has taken the position that vacation benefits must be continued during maternity leaves. However, the EEOC has held that seniority accrues during a reasonable maternity leave.

216. Western Airlines, Inc., 70-1 CCH Lab. Arb. Awards 4211, 4213 (1970) (Wyckoff, Referee).

217. *Id.* at 4211.

218. Hospital Serv. Plan, 66-3 CCH Lab. Arb. Awards 6820 (1966) (Scheiber, Arbitrator).

pany's prorated vacation benefits policy was equitable.

Future arbitration will have to take into account not only the recent district court decision in *Schattman v. Texas Employment Commission*,[219] but also some unusual twists arising from male reaction to the women's liberation movement. For example, the novel issue of granting maternity leaves of absence to male employees has arisen in contract negotiations at nine pulp and paper mills in British Columbia. Four months of maternity leave is being asked apparently to equate the male employees' fringe benefits with those of female employees. Moreover, the union also contends that a male employee is entitled to have time off to mind the children while his wife is in the hospital having a baby.[220] In two recent cases, one United States district court upheld,[221] while another invalidated,[222] mandatory leave provisions of state law under the Fourteenth Amendment rather than under Title VII. Even more recently, another district court held that it was a violation of equal protection to accord maternity leave only to tenured teachers, saying that untenured teachers should also receive leave when requested.[223]

B. Leaves of Absence for Jury Duty

Sex discrimination has also arisen in employer policies regarding paid leaves of absence for jury duty. A New York Supreme Court, for example, has held that a company is not guilty of sex discrimination under the New York FEP Act when it does not pay the regular salary to absent women employees serving as jurors even though it pays the salary of men serving as jurors.[224] The contract in question stated that teachers serving as jurors, who are required to do so, shall receive their full regular salary provided that they remit their juror pay to the school; whereas teachers serving as jurors, although not required by law to do so, shall receive no pay other than their juror pay. The court's rationale was that since state law made jury duty mandatory for males while exempting women from mandatory jury duty, then a female juror was a volunteer who could not insist upon being paid her

219. CCH EMP. PRAC. GUIDE ¶ 8146 (W.D. Tex. Mar. 4, 1971).

220. Des Moines Tribune, July 31, 1970, at 1, col. 3.

221. Jinks v. Mays, — F. Supp. — (N.D. Ga. Sept. 28, 1971), *summarized in* 40 U.S.L.W. 2193 (1971).

222. LaFleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208 (N.D. Ohio 1971).

223. Cohen v. Chesterfield County School Bd., 326 F. Supp. 1159 (E.D. Vir. 1971).

224. Goldblatt v. Board of Educ., 57 Misc. 2d 1089, 294 N.Y.S.2d 272 (Sup. Ct. 1968).

salary from the employer. This approach no longer seems viable in light of the subsequent head-on attacks on sex-based state legislation. Such a juror exemption law as New York's seems susceptible to an equal protection attack similar to that made in *Mengelkoch v. Industrial Welfare Comm'n.*[225]

An arbitrator took the same basic position a year earlier in a case involving the same school district but a different contract.[226] That contract provided for full regular pay, less juror pay, for (male) teachers serving as jurors because they were "required" to do so, but provided for no salary for (female) teachers serving as jurors although not "required" to do so. However, females were given a leave of absence for jury duty and they could keep their juror pay. The arbitrator declared: "I find nothing discriminatory in a contract clause which grants a benefit only to employees who are required to serve on a jury, and, in effect, imposes a different obligation on employees who are not required to serve but do so anyway."[227]

The arbitrator, however, unlike the court, also perceptively continued: "If there is any discrimination involved here, it lies in the law exempting certain people from jury duty, not in the contract."[228] The arbitrator could do no more, since his function was limited to interpretation of the contract; he obviously lacked any authority to declare illegal or unconstitutional the state law (exempting women but not men from mandatory jury duty). He then was called upon solely to interpret the word "required." The school contended that those "required" to serve meant only male teachers since they (unlike females generally as a class) did not enjoy blanket statutory exemption from mandatory jury duty. On the other hand, the teachers' union contended that "required" encompassed female teachers who, while they were exempted from mandatory jury duty ipso facto being women, nevertheless felt compelled ("required") to serve as jurors as part of their civic duties in being examples for their students. The arbitrator adopted the school's interpretation.[229]

225. 3 FAIR EMP. PRAC. CAS. 471 (9th Cir., May 3, 1971). The Ninth Circuit held that a three-judge district court erred in treating an equal protection clause attack on California's maximum hours legislation as constitutionally insubstantial.

226. Board of Educ., 45 Lab. Arb. 265, 65-2 CCH Lab. Arb. Awards 5361 (1965) (Stutz, Arbitrator).

227. *Id.* at 266, 65-2 CCH Lab. Arb. Awards at 5362.

228. *Id.*

229. *Id.* at 265-66, 65-2 CCH Lab. Arb. Awards at 5361-62.

C. Personal Appearance

Another developing problem area involves the question of whether there may be a legitimate bfoq in employee appearance. Recent style "revolutions" have prompted hasty action by many employers in promulgating personal appearance codes geared primarily to the two much discussed issues of female employees wearing pant suits and male employees sporting long hair, moustaches, or beards. The validity of these rules, since they infringe upon individual rights, depends mainly upon whether they serve a valid and reasonable business need.[230]

1. Long Hair

The question of whether an employer's ban on long hair for male employees can constitute sex discrimination is presently being tested in several fora. The EEOC has ruled that Title VII is violated when, absent a showing of business necessity, an employer refuses to hire a long-haired male and applies no similar restriction to females.[231] The first court of record that has, to date, decided the issue held that Title VII was not violated by an employer's hair-length regulations if they applied to males and females alike.[232] Characterizing the regulations as being "not unreasonable," the federal district court determined that their purpose was "to insure a neat and attractive, well groomed male

230. *See generally* Current Comment, *Personal Choice Must Be Based on Business Needs,* CCH EMP. PRAC. GUIDE ¶ 5158 (1971).

231. EEOC Decision No. 71-1529, CCH EMP. PRAC. GUIDE ¶ 6231 (Apr. 2, 1971). Finding that long hair would not have been a factor in the hiring process if the charging party were a female, the EEOC noted that the employer admitted employing both long- and short-haired females. Regarding the lack of a showing of business necessity (that male employees have short hair), the EEOC stated: "There is no claim or evidence that long hair would present safety or efficiency problems in the production areas; or that, assuming such problems, that a hairnet or other device would not solve the problem . . . ." *Id.* at 4410.

232. Dodge v. Grant Food, Inc., 3 FAIR EMP. PRAC. CAS. 374 (D.D.C. 1971). The employer operated self-service supermarkets selling foodstuffs. The court also noted that the regulations were the product of arbitration between the company and the union, "and were accepted by the Union as reasonable and acceptable."

Another federal district court is also considering the issue. Johnson v. Baptist Memorial Hosp., No. C-70-416 (W.D. Tenn. 1971), *noted in* CCH EMP. PRAC. GUIDE, Rep. No. 62 at 3 (Mar. 4, 1971). The EEOC filed an amicus curiae brief in that case, arguing that the exclusive application of a restriction upon hair length to males constitutes a disparate term or condition of employment based upon sex in contravention of Title VII. Applying the *Weeks* approach, the EEOC asserted that the defendant company must show a business need for a rule that male employees cannot have long hair. In other words, the employer must show that all males with long hair cannot safely and efficiently perform particular jobs while females with the same length of hair could perform the same jobs safely and efficiently.

or female clerk." However, another United States district court held that males with long hair must be permitted to wear the same hair restraints (hair nets) as women, instead of cutting their hair when it became too long to be covered by their working hats.[233]

The long hair issue has also been posed in terms of the constitutional right of expression, with a federal court of appeals stating definitively: "The right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution."[234] In another school dress code case, this same court observed: "Since fundamental rights are involved, we believe that [school officials] are required to employ narrow rules . . . and to avoid infringement of plaintiff's rights to an extent greater than is required by health and safety objectives."[235]

By analogy, an employer cannot arbitrarily refuse to hire a long-haired male merely because of the employer's distaste for persons who do not conform to society's norms as perceived by the employer. However, this is not to say that an otherwise qualified male with any length of hair must be considered for every type of job. Health and safety objectives relating to that job must be taken into consideration, provided that they are legitimate and are not used as a smokescreen. Thus, an employer can require a long-haired employee to wear some type of headgear as a health and safety measure, provided that the same regulation is applicable to female employees doing substantially the same type of work in that plant.

So far, the issue of hair length regulations has been posed in only one arbitral hearing. An arbitrator ruled that because of business necessity a company's rule banning long hair on male employees was reasonably related to the successful operation of the company's business, especially since the grievant frequently came into public contact with the customers.[236] The decision was pegged upon customer preference (a concept rejected by a federal court of appeals in *Diaz v. Pan American World Airways, Inc.*[237]), with the arbitrator noting that "there is a real danger that a considerable number of the Company's customers

233. Roberts v. General Mills, Inc., — F. Supp. — (N.D. Ohio Sept. 21, 1971) *summarized in* 40 U.S.L.W. 2188 (1971).

234. Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970). *See also* Bishop v. Colaw, — F.2d —, 40 U.S.L.W. 2296 (No. 20,588, Oct. 27, 1971) (slip op. at 11-15).

235. Crews v. Cloncs, 432 F.2d 1259, 1266 (7th Cir. 1970).

236. Allied Employers, Inc., 71-1 CCH Lab. Arb. Awards 3276 (1970) (Kleinsorge, Arbitrator).

237. 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 40 U.S.L.W. 3212 (1971).

would have an unfavorable reaction to males with long hair working in the store,"[238] even though they maintained an otherwise neat appearance. Nevertheless, the arbitrator did not believe it necessary that any complaints be lodged against the grievant or that certain customers be lost. "If the danger is there, and if application of the rule will remove the danger, the Company is acting reasonably in attempting to protect itself."[239] Conceding that female employees with the same length of hair were not discharged, he observed that "long hair on a man might be very conspicuous, while the same length hair on a woman would not be."[240] Thus, in his opinion, the no-sex bias protections in Title VII and the collective bargaining agreement were not violated.

Another arbitrator, while deciding a case on the basis of an employer's no-beards rule and its lack of "a reasonable relationship to the employer's business operations," touched upon hair rules involving sex discrimination.[241] He noted: "Few employers would dare to regulate the hair styles of their female employees so long as the hair styles did not present safety or sanitary problems and were not outlandish or bizarre."[242] Likewise, he felt that a beardless male face should not be a condition of continued employment.

Other arbitration cases, none of which even mentioned the sex discrimination issue, demonstrate the breadth of considerations that could guide arbitrators (and courts) in any future sex bias cases involving long hair.[243] The prevailing theory in arbitration is that "the [c]ompany has the right to require its employees to cut their hair and shave when long hair and beards can reasonably threaten the [c]ompany's relations with its customers or other employees, or a real question of safety is involved . . . ."[244] Otherwise, a male employee has "the right to maintain whatever fashion of hair he desire[s] so long as it [does] not affect his work, the [c]ompany's relations with other customers, or the work routine of the other employees."[245]

Arbitrators upholding long hair bans have stressed that an indi-

238. 71-1 CCH Lab. Arb. Awards at 3280.

239. *Id.*

240. *Id.* at 3281.

241. Roger Wilco Stores, 70-2 CCH Lab. Arb. Awards 5088, 5093 (1970) (Burns, Arbitrator).

242. *Id.* at 5093.

243. *See generally* Current Comment, *Hair Styles: Management's Right to Regulate*, CCH LAB. LAW REP., UNION CONT. ARB. ¶ 58,601 (1970).

244. Dravo Corp., 70-2 CCH Lab. Arb. Awards 4507, 4509 (1970) (Krimsly, Arbitrator).

245. *Id.* at 4510.

vidual's constitutional right to wear his hair at any length must be balanced against the employer's right to protect his business. "[A]n individual, by voluntarily entering into an employment relationship, must, as a condition of his employment, accept certain restrictions upon his actions," is how one arbitrator put it.[246] A company with a proven business need to project a certain image to the public can place reasonable restrictions upon the length of male employee's hair.[247] Recognizing that businesses have an extensive need to rely on public trust and confidence, one arbitrator has observed: "Whether right or wrong, the vast majority of the public has come to associate long hair and beards with irresponsibility."[248] Even where long hair bans have been ruled unreasonable, the arbitrator has nevertheless followed the approach that an employer can enforce reasonable rules regarding the personal appearance of those employees who come into contact with the public.[249]

Long hair bans have also been upheld for sanitation reasons, with one arbitrator quipping: "Although hair styles have changed, sanitation needs have not."[250] Yet rules promulgated on safety and sanitary grounds have been closely scrutinized. Medical evidence has been required to substantiate the necessity of a hair rule based on sanitation, while valid safety rules for a plant's production area have been held inapplicable to an employee working in a nondanger area.[251] One arbitrator pointed out that if the particular work in question involved hazardous work then requiring the wearing of a hard hat would provide for better protection than would a short haircut.[252] In other words, the propriety of hair rules should be measured by the extent of their effect on the employee's private life, thus requiring the option of

246. Dravo Corp., 67-1 CCH Lab. Arb. Awards, 4027, 4029 (1967) (Wood, Arbitrator); *accord*, Stop & Shop, Inc., 68-1 CCH Lab. Arb. Awards 3133 (1967) (Johnson, Arbitrator).

247. *See* Paul Masson, Inc., 70-2 CCH Lab. Arb. Awards 5440 (1970) (Kenaston, Arbitrator).

248. Western Air Lines, Inc., 69-2 CCH Lab. Arb. Awards 5566, 5568 (1969) (Steese, Arbitrator).

249. *See, e.g.*, United Parcel Service, Inc., 69-1 CCH Lab. Arb. Awards 3185 (1968) (Turkus, Arbitrator). The arbitrator, while ruling that a policy against beards was unreasonable, concluded that employees serving the public can be required to be clean-shaven.

250. Kellogg Co., 70-2 CCH Lab. Arb. Awards 5476, 5480 (1970) (Shearer, Arbitrator).

251. *See* Badger Concrete Co., 68-2 CCH Lab. Arb. Awards 4748 (1968) (Krinsky, Arbitrator).

252. Giles & Ransome Corp., 70-1 CCH Lab. Arb. Awards 4063, 4065 (1969) (Loucks, Arbitrator).

alternative means of upholding safety (e.g., protective headgear).[253]

The broad view is that hair rules must bear "a reasonable relationship to the employer's business and to the work of the [individual] employee involved", as well as to the standards of the community within which the company operates.[254] Thus, some arbitrators, applying *Weeks* and *Bowe*, have insisted that hair rules be applied on an individualized basis.[255] Moreover, arbitrators have recognized that grooming rules "should reflect contemporary changes in style."[256]

2. Dress Regulations

The issue of dress regulations is also being tested in the courts. One novel suit cuts to the heart of conventional ideas about dress and morality. A women fired by an Arkansas textile mill for reporting to work without wearing a brassiere has filed suit in federal district court, after the EEOC failed to conciliate her complaint.[257] She asserts that Title VII is violated when a company places restrictions on women's dress while not requiring that males "be attired in any special garb." She notes, for example, that male employees work without undershirts. The company claims that the bra-less employee "caused a disruptive effect among employees and plant efficiency," and that some female employees objected to her braless appearance. She is seeking reinstatement and back pay.

Women's wearing of slacks has been another problem in the area of employees' attire. For example, the EEOC has determined that Title VII is violated by a company policy which forbids female employees from wearing slacks but which places no restrictions upon male attire (thus allowing male employees to wear casuals or sportswear).[258] Similarly, an arbitrator found that a company did not show good cause for banning female employees from wearing "street" slacks underneath their sanitary smocks in a bakery.[259] The company had agreed to pro-

253. *See* Roger Wilco Stores, 70-2 CCH Lab. Arb. Awards 5088 (1970) (Burns, Arbitrator).

254. Pacific Gas & Elec. Co., 70-2 CCH Lab. Arb. Awards 5703, 5706 (1970) (Eaton, Arbitrator).

255. *See, e.g.*, City of Waterbury, 70-1 CCH Lab. Arb. Awards 4305 (1970) (Stutz, Arbitrator).

256. Pacific Gas & Elec. Co., 70-2 CCH Lab. Arb. Awards 5703, 5706 (1970) (Eaton, Arbitrator).

257. BNA, LAB. REL. REP., FAIR PRAC., SUMM. No. 148 (Oct. 22, 1970).

258. EEOC Decision No. 70-920, CCH EMP. PRAC. GUIDE ¶ 6156 (1970).

259. Drake Batteries, 71-1 CCH Lab. Arb. Awards 3561 (Feb. 12, 1971) (Kerrison, Arbitrator).

vide slacks as part of the standard uniform, and the employees were merely wearing their own while awaiting the arrival of these slacks. The company sought to justify its ban on "street" slacks on the basis of hygienic practice, but the arbitrator found more persuasive the union's argument that no applicable sanitary code was violated. Moreover, the union successfully argued that wearing the street slacks was reasonable in light of the facts that the employees were working in a drafty area and that their smocks extended beyond the work bench where the food was handled.

C. Separate Seniority Lists

One of the most pervasive problems in employment sex discrimination is the maintenance of separate sex-based seniority lists with accompanying sex-based separate lines of progression to various jobs. Jobs traditionally have been labeled either "men's" jobs or "women's" jobs, with separate seniority lists kept for those employees in each of the jobs. Accordingly, before 1965, arbitrators steadfastly ruled that any attempt to integrate the separate seniority lists dictated by a labor contract was invalid.[260]

Title VII, however, changes the public policy concerning seniority systems.[261] The EEOC guidelines on sex discrimination state: "It is an unlawful employment practice to classify a job as 'male' or 'female' or to maintain separate . . . seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job."[262] The EEOC subsequently held that perpetuation of original sex-segregated classification systems for seniority lists violates Title VII. Thus, plantwide seniority has been

260. For example, one arbitrator held that an employer violated a contract's provision for separate seniority lists by transferring female employees to male jobs and vice versa. L.D. Schreiber Cheese Co., 44 Lab. Arb. 873 (1965) (Anderson, Arbitrator). Another arbitrator, upholding an employer's right to select male inspectors for retention during layoff without regard to seniority of female inspectors, held that the separate sex-based seniority lists were consistent with past practices. Owens-Illinois Glass Co., 43 Lab. Arb. 715 (1964) (Dworkin, Arbitrator). Moreover, he noted that the union had failed to negotiate contract language that would reverse this situation. Likewise, another arbitrator held that a company's dual seniority system was existing at the time that the present contract was negotiated and the union did not question the practice. Pittsburgh Plate Glass Co., 8 Lab. Arb. 572 (1947) (Horvitz, Arbitrator). So, an arbitrator, in interpreting the contract, could not change the practice himself.

261. Title VII § 703(h), 42 U.S.C. § 2000e-2(h) (1964).

262. 29 C.F.R. § 1604.2 (1970). *See also* 41 C.F.R. § 60-20.4 (1970) (seniority guidelines of the Office of Federal Contract Compliance).
(Altrock, Arbitrator).

determined necessary to overcome past discriminatory effects whereby females were segregated both by department and job classification.[263] This approach by the EEOC is in line with that taken by a federal district court in *Quarles v. Philip Morris, Inc.*[264] (a race discrimination case).

At least one arbitrator subsequently took the strong position of ordering a company and union to negotiate an integration of job descriptions and lines of progression to eliminate the effects of sex-discrimination.[265] Such severe orders will be necessary in the future if companies are truly to eliminate sex discrimination in the industrial arena.

IV. Conclusion

The purpose of this article was to analyze the Title VII bfoq exemption as applied in the arbitral forum and to compare it to the treatment the bfoq exemption has received in judicial decisions and administrative guidelines. While a conflict still exists over the proper scope of arbitral hearings, the view that contract interpretations should properly consider the federal and state laws applicable to the circumstances seems to have prevailed. Thus, Title VII and the bfoq have frequently been applied in arbitral decisions and have had a significant impact. Prior to the passage of Title VII, most arbitrators adopted a stereotyped conception of women and allowed protective laws to control. But, on occasion, arbitral independence from the constrictions of judicial precedent resulted in decisions directing a more individualized treatment of women and men. On those few occasions, arbitration was a forerunner of recent legislation and its judicial interpretations. After the passage of Title VII, arbitrators seem to have followed the lead of courts in rejecting various employment practices, but the decisions are not uniform, particularly when heavy lifting has been involved. Certainly, arbitration has not distinguished itself as more effective than the courts at preventing sex discrimination, and, in some cases, has been much slower to recognize evolving standards. In both areas, a serious problem also exists due to conflicting decisions from courts of equal status in adjacent or overlapping geographic jurisdictions.[266]

In general, the arbitral process and the judicial process have

263. *See, e.g.*, EEOC Decision No. 71-362, CCH EMP. PRAC. GUIDE ¶ 6169 (1970).

264. 279 F. Supp. 505 (E.D. Va. 1968).

265. South Pittsburgh Water Co., 71-1 CCH Lab. Arb. Awards 4516 (1971) (Altrock, Arbitrator).

266. See, for example, text accompanying notes 97-100 *supra*.

reached quite similar results in their interpretation of Title VII proscriptions, largely due to arbitrators following court precedents. But this will have to change in the near future. As court congestion increasingly forces grievants to resort to arbitration as a means of dispute settlement, arbitrators will have to abandon their reliance on court determinations and their reluctance to formulate new standards on their own. Industrial jurisprudence will have to give up any pretense of limiting the scope of its deliberations or abdicate its increasing judicial responsibility. This may be a period of transition for the arbitral process just as it is a period of transition for women's rights. The end result for each will, in large part, depend upon how successfully the two become intertwined and whether they complement each other's growth or come into conflict in this vital area of national policy.